U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

PRESENTATION TO THE 7TH PROCUREMENT FRAUD

COURSE - JUDGE ADVOCATE GENERAL'S SCHOOL

CRIMINAL REMEDIES

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BY: JAMES J. GRAHAM
TRIAL ATTORNEY
CRIMINAL DIVISION, FRAUD SECTION
U.S. DEPARTMENT OF JUSTICE

PROCUREMENT FRAUD - CRIMINAL REMEDIES

The object of this presentation is to cover the tools used by Federal criminal investigators and prosecutors to combat contract fraud and to explain the prosecutive process in selecting cases for prosecution.

I. Types of Criminal Contract Fraud

- Product Substitution - failing to supply contracted item in conformity to contract specs
- Cost Mischarging - falsely reflecting costs to inflate contractor's cost recovery
- Progress Payments - exaggerating progress on a contract to obtain payments earlier than entitled
- False Claims/Billing - billing the government for something not supplied
- Truth in Negotiations/GSA Multiple Award/Best Prices - failure to disclose accurate historical costs/prices/discounts
- Information Espionage - stealing government or competitor information to enhance position in competitive procurement
- Corruption/Conflict of Interest - bribes/gratuities/job offers to influence contract officials

II. Who Prosecutes and Investigates

- 95 Federal districts
- Specialized white collar units
- Main Justice Fraud and Public Integrity Sections
- National Coordinating efforts - Barbara Corprew (202/616-0440)
- Investigators come from DCIS/IG, FBI, CID, NCIS, OSI
- Auditors-DCAA

III. Applicable Criminal Statutes

A. Fraud Statutes

18 U.S.C. §1001 False Statements

- Literally false
- Concealment
- Materiality
- Matter within the jurisdiction - no need for a submission

18 U.S.C.§ 287 - False Claims

- Requires a false claim submission to the U.S.
- 18 U.S.C. § 2 “causes” a false claim

18 U.S.C. § 1031 - Major Fraud Act

- Scheme or artifice to defraud
- Prime contract over $1 million
- Maximum fine of $1 million and ten years

- Employee whistleblower protection

41 U.S.C. § 423 - Procurement Integrity

- Ill Wind reforms
- Protects bid or proposal or source selection information
- Duty to disclose
- Employment discussions with procurement officials

18 U.S.C. § 1956 - Money Laundering - proceeds of some unlawful activity

- With intent to promote
- To conceal or disguise
- Conducts a financial transaction

41 U.S.C. §§ 51-54 Anti Kickback

- Prime sub/vendor kickbacks
- Duty to disclose

18 U.S.C. §§ 1341/1343 Mail and Wire Fraud

- Scheme and artifice
- Government victim
- Each use of the mails to further the scheme

18 U.S.C. § 371 Conspiracy Agreement

- To violate or defraud – "obstruct or impair"
- Overt act-statute of limitations-5 years

B. Corruption/Conflict of interest Statutes

18 U.S.C. § 201 Bribery and Gratuity

- Public official
- Thing of value
- To influence vs for or because of an official act

18 U.S.C. § 207 Restrictions on former employees

- Permanent bar
- Two-year bar on matters under official responsibility
- One-year bar on making even making an appearance by senior employees

18 U.S.C. § 208 Acts affecting a personal financial interest

- Participates personally and substantially
- Negotiating or has arrangement regarding employment

41 U.S.C. § 423 Procurement Integrity restrictions on acquisition officials

15 U.S.C. § 78dd-1 Foreign Corrupt Practices Act

- Foreign official
- To obtain or retain business
- U.S. companies/people/instrumentality
- Agents/commissions FAR §3.4
- Foreign military sales

C. Obstruction of Justice

18 U.S.C.§1503 General Obstruction

- Endeavor
- Corruptly
- Obstruct the due administration of justice

18 U.S.C. § 1505 Obstruction of Administrative Proceeding

- Covers administrative proceedings such as BCA and debarment
- Proceeding must be pending

18 U.S.C.§ 1510 Obstruction of an investigation

- Endeavors by bribery
- Prevent communication to an Investigator

18 U.S.C. § 1512 Tampering with a witness

- Physical force to prevent
- Intimidation or misleading conduct
- Influence a witness or withhold docs
- Existing investigation; or
- Relating to the commission of a federal offense- very important

18 U.S.C. § 1516 Obstruction of an audit

- Covers federal auditor - includes DCAA
- With intent to deceive or defraud “corruptly”

18 U.S.C. §§ 1621-1623 Perjury

- False
- Material
- Bronston

D. Other Criminal Offenses

18 U.S.C. §§ 1029-1030 Computer fraud

18 U.S.C. § §1831-32 Economic espionage/theft of trade secrets

18 U.S.C. § 1951 Hobbs Act extortion

18 U.S.C. § 1961 - RICO

IV. Evidence Gathering Tools

- FBI/IG/Military investigator interviews
- Grand Jury subpoenas for documents and testimony

  Secrecy limitations under Rule 6, Fed.R.Crim.P.
- Inspector General subpoenas 5 U.S.C. App III § 37333 for documents only
- Civil Investigative Demands 31 U.S.C. § 3733 for documents and testimony in civil false claims cases
- DCAA subpoenas - 10 U.S.C. § 2313(d)(1)
- Wiretaps under 18 U.S.C. § 2511 - Application and Judicial supervision
- Search Warrants - Rule 41 probable cause - pros and cons
- Consensual Monitoring
- Undercover investigations
- Immunity - formal and informal - “queen for a day”

V. Key issues in Contract Fraud cases

- What does the contract say?
- Where is the false claim/statement?

- Is it really false or just misleading?
- Is it material?
- What was the amount of the actual loss?
- Did the government know about the contract violation and elect to ignore?
- How can you show it was not just a mistake?
- Prosecutorial Discretion - criminal vs civil fraud

VI. **Some Unique Issues**

- Qui tam cases
- Parallel Proceedings - - Stringer and Scrushy - "notice and good faith"
  - - suspension or debarment
  - - claims litigation
- DOD Voluntary Disclosure program
- New expectations on corporate cooperation - Thompson memo, etc.
- The Federal Sentencing Guidelines in contract fraud cases

Exhibits: Statutes

Articles

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18 U.S.C.A. § 1001

Effective: December 17, 2004

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 47--FRAUD AND FALSE STATEMENTS
→§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

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18 U.S.C.A. § 287

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 15--CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT
→§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

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18 U.S.C.A. § 1031

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 47--FRAUD AND FALSE STATEMENTS
→§ 1031. Major fraud against the United States

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent--

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and--

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including--

(1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant;

(2) whether the defendant previously has been fined for a similar offense; and

(3) any other pertinent equitable considerations.

18 U.S.C.A. § 1031

(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.

(g)(1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section.

(2) An individual is not eligible for such a payment if--

(A) that individual is an officer or employee of a Government agency who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;

(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or

(D) that individual participated in the violation of this section with respect to which such payment would be made.

(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.

(h) Any individual who--

(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and

(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

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41 U.S.C.A. § 423

Effective: [See Notes]

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 7--OFFICE OF FEDERAL PROCUREMENT POLICY

→§ 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

(a) Prohibition on disclosing procurement information

(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of Title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.

(2) Paragraph (1) applies to any person who--

(A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

(b) Prohibition on obtaining procurement information

A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) Actions required of procurement officers when contacted by offerors regarding non-Federal employment

(1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall--

(A) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(B)(i) reject the possibility of non-Federal employment; or

(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such

procurement, in accordance with the requirements of section 208 of Title 18 and applicable agency regulations on the grounds that--

(I) the person is no longer a bidder or offeror in that Federal agency procurement; or

(II) all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of Title 5 under subsection (b)(1) of such section may be withheld from disclosure to the public.

(3) An official who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(4) A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(d) Prohibition on former official's acceptance of compensation from contractor

(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official--

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of $10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000 awarded to that contractor; or

(C) personally made for the Federal agency--

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;

(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of $10,000,000;

(iii) a decision to approve issuance of a contract payment or payments in excess of $10,000,000 to that contractor; or

(iv) a decision to pay or settle a claim in excess of $10,000,000 with that contractor.

(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

(3) A former official who knowingly accepts compensation in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(4) A contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.

(e) Penalties and administrative actions

(1) Criminal penalties

Whoever engages in conduct constituting a violation of subsection (a) or (b) of this section for the purpose of either--

(A) exchanging the information covered by such subsection for anything of value, or

(B) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than 5 years or fined as provided under Title 18, or both.

(2) Civil penalties

The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section. Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than $500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) Administrative actions

(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section, the Federal agency shall consider taking one or more of the following actions, as appropriate:

(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

(ii) Rescission of a contract with respect to which--

(I) the contractor or someone acting for the contractor has been convicted for an offense punishable under paragraph (1), or

(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of Title 5 or other applicable law or regulation.

(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) of this section affects the present responsibility of a Government contractor or subcontractor.

(f) Definitions

As used in this section:

(1) The term "contractor bid or proposal information" means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data (as defined by section 2306a(h) of Title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section).

(B) Indirect costs and direct labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as "contractor bid or proposal information", in accordance with applicable law or regulation.

(2) The term "source selection information" means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(C) Source selection plans.

(D) Technical evaluation plans.

(E) Technical evaluations of proposals.

(F) Cost or price evaluations of proposals.

(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected

for award of a contract.

(H) Rankings of bids, proposals, or competitors.

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

(3) The term "Federal agency" has the meaning provided such term in section 102 of Title 40.

(4) The term "Federal agency procurement" means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

(5) The term "contracting officer" means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(6) The term "protest" means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of Title 31.

(7) The term "official" means the following:

(A) An officer, as defined in section 2104 of Title 5.

(B) An employee, as defined in section 2105 of Title 5.

(C) A member of the uniformed services, as defined in section 2101(3) of Title 5.

(g) Limitation on protests

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

(h) Savings provisions

This section does not--

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

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18 U.S.C.A. § 1956

This document has been updated. Use KEYCITE.

Effective: January 10, 2006

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 95--RACKETEERING

→§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds

involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 [FN1] of the International Banking Act of 1978 (12 U.S.C. 3101) ;

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [FN2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by

means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 [FN3] (relating to fraudulent Federal credit institution entries), 1007 [FN3] (relating to fraudulent Federal Deposit Insurance transactions), 1014 [FN3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 [FN3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) [FN4]

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties

or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

[FN1] So in original. Probably should read "section 1(b)".

[FN2] So in original. The second closing parenthesis probably should not appear.

[FN3] So in original. Probably should be preceded by "section".

Westlaw.

41 U.S.C.A. § 52

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS
→§ 52. Definitions

As used in sections 51 to 58 of this title:

(1) The term "contracting agency", when used with respect to a prime contractor, means any department, agency, or establishment of the United States which enters into a prime contract with a prime contractor.

(2) The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(3) The term "person" means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

(4) The term "prime contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(5) The term "prime contractor" means a person who has entered into a prime contract with the United States.

(6) The term "prime contractor employee" means any officer, partner, employee, or agent of a prime contractor.

(7) The term "subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

(8) The term "subcontractor"--

(A) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and

(B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

(9) The term "subcontractor employee" means any officer, partner, employee, or agent of a subcontractor.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

Westlaw.

41 U.S.C.A. § 53

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS
→§ 53. Prohibited conduct

It is prohibited for any person--

(1) to provide, attempt to provide, or offer to provide any kickback;

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

Westlaw.

41 U.S.C.A. § 54

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 1--GENERAL PROVISIONS
➞§ 54. Criminal penalties

Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with Title 18, or both.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 1341

Effective: July 30, 2002

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 63--MAIL FRAUD
→§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 1343

Effective: July 30, 2002

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 63--MAIL FRAUD

→§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 371

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 19--CONSPIRACY

→§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 201

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 11--BRIBERY, GRAFT, AND CONFLICTS OF INTEREST
→§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section--

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever--

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever--

(1) otherwise than as provided by law for the proper discharge of official duty--

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

Westlaw.

18 U.S.C.A. § 207

Effective: July 07, 2004

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 11--BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

→§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies.--

(1) Permanent restrictions on representation on particular matters.--Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.--Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

(3) Clarification of restrictions.--The restrictions contained in paragraphs (1) and (2) shall apply--

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

(b) One-year restrictions on aiding or advising.--

(1) In general.--Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) Definition.--For purposes of this paragraph--

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) One-year restrictions on certain senior personnel of the executive branch and independent agencies.--

(1) Restrictions.--In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.--(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))--

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which that person is paid at a rate of

basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, or, for a period of 2 years following the enactment of the National Defense Authorization Act for Fiscal Year 2004, a person who, on the day prior to the enactment of that Act, was employed in a position which is not referred to in clause (i) and for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5304 or section 5304a of title 5, was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service on the day prior to the enactment of that Act,

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3,

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above; or

(v) assigned from a private sector organization to an agency under chapter 37 of title 5.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that--

(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

(d) Restrictions on very senior personnel of the executive branch and independent agencies.--

(1) Restrictions.--In addition to the restrictions set forth in subsections (a) and (b), any person who--

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,

and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) Persons who may not be contacted.--The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are--

(A) any officer or employee of any department or agency in which such person served in such position within a

period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5.

(e) Restrictions on Members of Congress and officers and employees of the legislative branch.--

(1) Members of Congress and elected officers.--(A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.

(2) Personal staff.--(A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Senator or Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Senator or Member of the House of Representatives.

(3) Committee staff.--Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) Leadership staff.--(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section

216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives; and

(ii) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.

(5) Other legislative offices.--(A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that person's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(6) Limitation on restrictions.--(A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level 5 of the Senior Executive Service.

(7) Definitions.--As used in this subsection--

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, and an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a

Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the Government Accountability Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

(f) Restrictions relating to foreign entities.--

(1) Restrictions.--Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection--

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) Special rule for Trade Representative.--With respect to a person who is the United States Trade Representative or Deputy United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities at any time after the termination of that person's service as the United States Trade Representative.

(3) Definition.--For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

(g) Special rules for detailees.--For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

(h) Designations of separate statutory agencies and bureaus.--

(1) Designations.--For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

(2) Inapplicability of designations.--No agency or bureau within the Executive Office of the President may be designated under paragraph (1) as a separate department or agency. No designation under paragraph (1) shall apply to persons referred to in subsection (c)(2)(A)(i) or (iii).

(i) Definitions.--For purposes of this section--

(1) the term "officer or employee", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include--

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, and Members of Congress;

(2) the term "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action; and

(3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

(j) Exceptions.--

(1) Official government duties.--The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.

(2) State and local governments and institutions, hospitals, and organizations.--The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of--

(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or

(B) an accredited, degree-granting institution of higher education, as defined in section 101 of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

(3) International organizations.--The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

(4) Special knowledge.--The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

(5) Exception for scientific or technological information.--The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.

(6) Exception for testimony.--Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence--

(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and

(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.

(7) Political parties and campaign committees.--(A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

(B) Subparagraph (A) shall not apply to--

(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or

(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections [FN1] (c), (d), or (e) if, at the time of the communication or appearance, the person is employed by a person or entity other than--

(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or

(II) a person or entity who represents, aids, or advises only persons or entities described in subclause (I).

(C) For purposes of this paragraph--

(i) the term "candidate" means any person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office;

(ii) the term "authorized committee" means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination for election, or the election, of such candidate, or to explore the possibility of seeking nomination for election, or the election, of such candidate, except that a political committee that receives contributions or makes expenditures to promote more than 1 candidate may not be designated as an authorized committee for purposes of subparagraph (A);

(iii) the term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level;

(iv) the term "national Federal campaign committee" means an organization that, by virtue of the bylaws of a political party, is established primarily for the purpose of providing assistance, at the national level, to candidates nominated by that party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) the term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level;

(vi) the term "political party" means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of such association, committee, or organization; and

(vii) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(k)(1)(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.

(B)(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person's Federal Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Federal Government employment began.

(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or

employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person's Federal Government employment began shall apply to that person's employment by any such national laboratory after the person's employment by the Federal Government is terminated.

(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and shall identify--

(A) the officer or employee covered by the waiver by name and by position, and

(B) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(4) The President may not delegate the authority provided by this subsection.

(5)(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.

(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.

(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title 5.

(l) Contract advice by former details.--Whoever, being an employee of a private sector organization assigned to an agency under chapter 37 of title 5, within one year after the end of that assignment, knowingly represents or aids, counsels, or assists in representing any other person (except the United States) in connection with any contract with that agency shall be punished as provided in section 216 of this title.

[FN1] So in original. Probably should be "subsection".

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

Westlaw.

18 U.S.C.A. § 208

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 11--BRIBERY, GRAFT, AND CONFLICTS OF INTEREST
→§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply--

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is

recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

15 U.S.C.A. § 78dd-1

C

Effective: November 10, 1998

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES
→§ 78dd-1. Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or

omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined

15 U.S.C.A. § 78dd-1

in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

MEMORANDA OF PRESIDENT

<Nov. 16, 1998, 63 F.R. 65997>

Delegation of Authority Under Section 5(d)(2) of the International Anti-Bribery and Fair Competition Act of 1998

Memorandum for the Secretary of State

By virtue of the authority vested in me by the Constitution and laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to the Secretary of State the functions and authorities vested in the President by section 5(d)(2) of the International Anti-Bribery and Fair Competition Act of 1998 (Public Law 105-366) [set out in a note under this section].

You are authorized and directed to publish this memorandum in the **Federal Register.**

WILLIAM J. CLINTON

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

Westlaw Attached Printing Summary Report for GRAHAM,JAMES 5567085

Date/Time of Request:	Wednesday, April 05, 2006 09:59:00 Central
Client Identifier:	DOJ
Database:	USCA
Citation Text:	15 USCA s 78dd-2
Lines:	369
Documents:	1
Images:	0

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15 U.S.C.A. § 78dd-2

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Effective: November 10, 1998

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES
→§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or

omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony

touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the

procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, by made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official

capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

15 U.S.C.A. § 78dd-2

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.";

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

END OF DOCUMENT

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18 U.S.C.A. § 1512

Effective: November 02, 2002

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 73--OBSTRUCTION OF JUSTICE

→§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is--

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case

of any other killing, the punishment provided in section 1112;

(B) in the case of--

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [FN1] supervised release,, [FN2] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation [FN1] supervised release,, [FN2] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

[FN1] So in original. A comma probably should appear.

[FN2] So in original. The second comma probably should not appear.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

18 U.S.C.A. § 1512

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 1516

Effective: November 02, 2002

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 73--OBSTRUCTION OF JUSTICE

→§ 1516. Obstruction of Federal audit

(a) Whoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of $100,000, directly or indirectly, from the United States in any 1 year period under a contract or subcontract, grant, or cooperative agreement, or relating to any property that is security for a mortgage note that is insured, guaranteed, acquired, or held by the Secretary of Housing and Urban Development pursuant to any Act administered by the Secretary, or relating to any property that is security for a loan that is made or guaranteed under title V of the Housing Act of 1949, shall be fined under this title, or imprisoned not more than 5 years, or both.

(b) For purposes of this section--

(1) the term "Federal auditor" means any person employed on a full- or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States; and

(2) the term "in any 1 year period" has the meaning given to the term "in any one-year period" in section 666.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 1621

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 79--PERJURY
→§ 1621. Perjury generally

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

END OF DOCUMENT

Westlaw.

18 U.S.C.A. § 1623

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 79--PERJURY

→§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

Westlaw.

10 U.S.C.A. § 2313

Effective: October 05, 1999

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A--GENERAL MILITARY LAW
PART IV--SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 137--PROCUREMENT GENERALLY

→§ 2313. Examination of records of contractor

(a) Agency authority.--(1) The head of an agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of--

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that agency under this chapter; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to section 2306a of this title with respect to a contract or subcontract, to examine all records of the contractor or subcontractor related to--

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(b) DCAA subpoena authority.--(1) The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of any records of a contractor that the Secretary of Defense is authorized to audit or examine under subsection (a).

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be redelegated.

[(4) Repealed. Pub.L. 106-65, Div. A, Title X, § 1032(a)(2), Oct. 5, 1999, 113 Stat. 751]

(c) Comptroller general authority.--(1) Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and

involve transactions relating to, the contract or subcontract.

(2) Paragraph (1) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency concerned determines, with the concurrence of the Comptroller General or his designee, that the application of that paragraph to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required--

(A) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination; and

(B) where the head of the agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) Paragraph (1) may not be construed to require a contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another provision of law.

(d) Limitation on audits relating to indirect costs.--The head of an agency may not perform an audit of indirect costs under a contract, subcontract, or modification before or after entering into the contract, subcontract, or modification in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer's determination.

(e) Limitation.--The authority of the head of an agency under subsection (a), and the authority of the Comptroller General under subsection (c), with respect to a contract or subcontract shall expire three years after final payment under such contract or subcontract.

(f) Inapplicability to certain contracts.--This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is for an amount not greater than the simplified acquisition threshold.

(g) Forms of original record storage.--Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form.

(h) Use of images of original records.--The head of an agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(i) Records defined.--In this section, the term "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

Revised section	Source (U.S. Code)	Source (Statutes at Large)
2313(a)	41:153(b) (words after semicolon of last sentence).	Feb. 19, 1948, ch. 65, § 4(b) (words after semicolon of last sentence), 62 Stat. 23.
2313(b)	41:153(c).	Feb. 19, 1948, ch. 65, § 4(c); added Oct. 31, 1951, ch. 652 (as applicable to § 4(c); of the Act of Feb. 19, 1948, ch. 65), 65 Stat. 700.

Current through P.L. 109-212 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved April 1, 2006

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Mischarging: A Contract Cost Dispute or a Criminal Fraud?

James J. Graham*

*Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice, with assistance of legal assistant Audrey A. Word. The views and conclusions expressed by the author do not necessarily reflect the views of the Department of Justice or any other governmental organization.

I. Introduction

"Labor mischarging" is the term used largely by government auditors, investigators and prosecutors to describe a particular type of fraud involving the accounting treatment of costs by government contractors. Mischarging is the false description of costs in a government contractor's books and records. This is a concern of the government particularly where the false description of costs increases the amount paid by the United States to the contractor.[1]

Mischarging occurs in the context of cost type contracts and other contractual situations where allowable costs are in question.[2] For example, when the government agrees to pay a contractor for all his costs plus a fee (profit) for the construction of a computer or the conduct of a study and the contractor includes in his costs the labor effort expended on a non-government project unrelated to the construction of the ship, a mischarging occurs.[3] It seems simple. If the proof is accompanied by proof of intent to defraud it is a

1. Mischarging is not a term found in the regulations or treatises but is an operative term used primarily by government auditors and adopted by others.

DCAA Contract Audit Manual [hereinafter DCAM] describes mischarging as deliberately falsified labor distribution and payroll records:

> these include among others, charging cost-type labor contracts with costs applicable to firm-fixed price work, charging employee labor costs to other direct and indirect activities when contractor project budgets, contracting ceilings or advance agreement (e.g., IR&D/B&P) limitations are about to be exceeded, and charging material costs with inflated prices recorded from invoices from ficitious or 'dummy' companies.

Accuracy of cost data is fundamental concept in government procurement. The Truth in Negotiation Act, 10 U.S.C. § 2306 (1983), requires certificate of cost and pricing data. The Contract Disputes Act of 1978 prescribes penalties for false claims. 41 U.S.C. 604.

2. The Contract Cost Principles and other Procedures appear in the Defense Acquisition Regulations (DAR), 32 C.F.R. 15-101ff, the Federal Procurement Regulations appear in 41 C.F.R. 5ff and the new Federal Acquisition Regulations (FAR), effective for all contracts after 1984, appear in 48 C.F.R. 31.000ff. For definition of cost contracts, *see* DAR 3–405; FAR 16.302. Since the focus of the cases prosecuted to date involves Department of Defense contracts, this article will direct attention to the provisions of the DAR and the FAR and other rules and practices involved in contracting with DOD. However, as a practical matter, the FPR cost principles present no discernible difference for purposes of criminal prosecution.

3. There are only three reported mischarging type cases. United States v. McGunnigal, 151 F.2d 162 (1st Cir.), *cert. denied*, 326 U.S. 776 (1945) involved a conspiracy between welders and counters who manufactured and constructed ships for the United States under cost-plus contracts. Counters, in return for money paid by welders, increased the amount of welding on daily tally sheets and credited the welders with overtime work not performed. As a result the Navy Department reimbursed the shipyard for the fraudulent inflated payroll costs.

United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983), involved concealment and false statements by an engineering firm representing a city in the application and construction of a federally-funded project to repair flood-damaged streets. In addition to concealing the existence of two sets of plans from the Federal Emergency Management Agency, the firm and its officers were involved in a scheme to mischarge labor costs which resulted in an overcharge of $13,217.59. Discrepancies uncovered were: (1) hours entered on time summaries were not supported by timecards; (2) differences between the amounts of time charged to projects on employee timecards and time charged on the project summary sheet; (3) hours entered on timecards for work on one project which were assigned to a different project on time summa-

straightforward false claim or, more generally, a fraud on the government or for that matter any other customer.[4] However, the government's rules, regulations and practices which determine what costs are allowable and applicable to a particular contract are extensive and complicated.

The Defense Logistics Agency, which has significant administrative contracting responsibility in this area, describes some examples of mischarging:

(i.) Contractor submits a payment request for reimbursement for costs not incurred by inflating the number of hours actually spent on a particular task; (ii.) contractor submits a payment request for reimbursement for costs claimed to have been incurred on a particular cost-type contract when those costs were actually incurred on another cost-type contract where the contract cost estimate has been exceeded and notice was not provided the contracting officer or those costs were actually incurred on a fixed-price contract in a loss position; (iii.) contractor submits a payment request for reimbursement for costs claimed to have been incurred for a particular purpose (e.g., marketing) when previously this same item of expense had been treated as a different type of expense (e.g., B&P) and the negotiated ceiling for the time previously charged has been met or exceeded; and (iv.) contractor purchases a piece of equipment for use in connection with both his commercial and government work and requests reimbursement for its entire cost against the Government contract.[5]

This paper will address the types of false descriptions and the various circumstances in which cost mischarging commonly arise. Mischarging is a particularly suitable area to examine the distinctions between a contract disagreement and a criminal fraud. Although the number of criminal prosecutions are not large in number, their impact on the public contracting community has been substantial. Every major contractor has been engaged in disputes which either could have been or in fact were characterized as mischarging

ries; and (4) hours entered for one project on timecards being billed to two different projects on the summaries.

United States v. Maher, 582 F.2d 842 (4th Cir. 1978) involved false claims submitted to the Army requesting payments under a "time-and-materials" contract to conduct experiments with separate maximum prices allocated to each "task." The corporate bookkeeper was instructed to inflate the labor hours on monthly billings submitted under government contracts, prepare new employee time sheets to conform to the billing changes, trace over the employees' signatures on the new time sheets and destroy the original ones in order to obtain $68,000 in excess payments.

These cases involved issues of much smaller amounts than the cases described in Section VII. The Fourth Circuit opinion in *Maher* discusses many of the defenses generally available. Mischarging can be simply charging one government agency for the costs of the other. One test to apply is whether the consequence of the mischarge is that the government ultimately paid costs it would otherwise not have paid. In the analysis, contract and overhead ceilings are usually involved, which, if applied, may preclude payment.

4. A mischarging prosecution can be directed at non-government clients with the United States if the mails are utilized as a scheme to defraud. 18 U.S.C. 1341. The ASI case described in Section VII is worthy of note in this regard.

5. Definition developed by Defense Logistics Agency Counsel's Office.

with criminal implications.[6] A brief review of the regulatory environment of these cases, the scope of the applicable criminal statutes, the detection procedures, common defenses, common settlement issues and the facts and circumstances of the criminal prosecutions filed to date will set out a number of legal and strategic issues that arise in this and other areas of special emphasis for the United States.[7]

II. Rules and Regulations

The issue of contractor costs arises in the determination of reimbursable costs under cost type contracts, negotiating overhead rates, pricing of contracts, determination of contract claims, price revision, price redeterminations and various other contractual stages.[8] The accounting practices and procedures of government contractors are set by the cost principles in the Defense Acquisition Regulations (DAR) and the Federal Acquisition Regulations (FAR),[9] the General Accounting Office Cost Accounting Standards (CAS)[10] and the contract itself. Although the government does not prescribe a particular accounting method, the Cost Accounting Standards, the FAR and the DAR require most major contractors to file a CAS Disclosure Statement.[11] The Defense Contract Audit Agency (DCAA) must approve the reliability of the contractor's accounting system.[12] In addition to the government auditor, the contracting officer and the government customer can prove to be critical partners in assessing the ap-

6. The Defense Logistics Agency, which has been responsible for coordinating the DCAA referrals, estimates DCAA referred seventy cases from 1977 to 1982 resulting in five convictions. In 1983, DCAA reported seventy-four referrals to investigative agencies. These included referrals of twenty-six mischarging, three overstating progress payments, fifteen false records, and six proposal misrepresentation matters. Testimony of Charles O. Starrett, Director, Defense Contract Audit Agency, before the Senate Governmental Affairs Committee, March 1, 1984.

7. Another area of possible future attention is so-called defective pricing. Pub. L. No. 77-653, DAR 7-104.29, DAR 3-8074; FAR 52.215–22, 215–23, 214–27. Truth in Negotiation Act, 10 U.S.C. § 2306f(1)-(3). Starrett, *supra*.

8. DAR 15-102 (1983); FAR 31.103. Even in fixed price contracts, the cost principles apply to advance payments, DAR 7-104.34, FAR 5252.232-12; pricing of adjustments DAR 7-103.26; equitable adjustments pursuant to a change clause, DAR 7-103.2, FAR 52.243-1, 7-203.2, 7-602.3, FAR 51.243-4 7-104.77(f) clause a; pricing termination settlements DAR 8-214, FAR 49.113.

9. DAR 15 (1983), FAR 31ff.

10. Although the Cost Accounting Standards Board expired, its standards still apply, 50 U.S.C. app. § 2168 (1983); 4 C.F.R. § 331 (1983); DAR 7-104.83 (1983); FAR 30ff.

11. 4 C.F.R. § 351 (1983), Cost Accounting Standards; FAR 30.201-1.

12. The Defense Contract Audit Agency (DCAA) formed in 1965 performs all necessary contract audits for the Department of Defense and provides accounting and financial advisory services regarding contracts and subcontracts to all Department of Defense components responsible for procurement and contract administration. Department of Defense Directive 5105.36. DCAA had 3,600 employees in six regional offices with fifty-four resident audit offices and seventy-three branch offices.

plicability of a particular effort to a specific contract and other cost-related issues.[13]

The general rule is that contractor's costs to be reimbursable must be reasonable and allocable and not subject to a ceiling or cost limitation.[14] Costs in a government contract are generally broken down to direct and indirect costs. Reasonableness relates to concepts such as ordinary and necessary, generally accepted, precedent, and established practice.[15] A cost is allocable if it is incurred specifically on a given contract, benefits a specific contract, or lacking a direct relationship to a contract, is necessary to the overall operations of a contractor's business.[16] In addition to general principles, the cost principles address the treatment of certain selected costs.[17]

The Cost Accounting Standards (CAS) govern contractors' accounting practices through nineteen particular standards. The CAS Disclosure Statement describes the contractors' accounting system. The standards prescribe general rules and principles relating to consistency in pricing proposals, criteria for allocating costs incurred for similar objectives, allocation of home office expenses, capitalization and depreciation of assets, accounting for vacation and leave costs, allocation of G & A expenses, etc.[18]

The regulations and the cases incorporate substantial flexibilities in the implementation of the government's Cost Principles. Issues of estoppel, foreseeability, constructive notice, relationship to cost objective, unanticipated cost increases, gov-

13. The contracting officer is authorized to settle disputes. DAR 7-103.12, FAR 52.233-1, Contract Disputes Act of 1978, 41 U.S.C. 601–613. Contracting officers for example can waive the limitation on cost overruns, Appeal of Ryan Aeronautical Co., ASBCA 6244, 61-1 BCA 2911 (1961), General Electric v. United States, 412 F.2d 1215, 188 Ct. Cl. 620 (1969), and can overrule a cost principle and find a cost allowable. Chrysler Corporation, ASBCA 17259, 75-1 BCA 11236 *aff'd. on recon.*, 76-1 BCA 11665, 17 GC 447 (notice to the government of an accounting treatment was computed to the government through knowledge of Army Audit); Educational Computer Corporation, ASBCA 20749, 78-1BCA 13111, *vacated by agreement of parties* 79-1 ¶ 13, 689.

14. DAR 15-201, FAR 31.201.

15. DAR 15-201.3, FAR 31.201–3. A major factor in assessing reasonableness is Generally Accepted Accounting Principles—American Institute of Certified Public Accountants, Professional Standards (1984).

16. DAR 15-201.4, FAR 31.201.–4. This can be a complicated factual issue. *See* General Dynamics Corp., Electric Boat Division, ASBCA No. 18503, 75-2 BCA 11, 521, *aff'd* 76-1 BCA 11,743, in which the bid and proposal costs were incurred in seeking commercial business. The ASBCA found these costs were allocable to government contracts. The benefit of the government was indirect in terms of overall enhancement of the contractor's expertise in submarine building as well as reducing the fixed overhead expenses allocable to the government.

17. For example, Advertising DAR 15-205.1, FAR 31.205.1; Bid and Proposal DAR 15-205.3, FAR 31.205–18; Compensation for Personal Services, DAR 15-205.6, FAR 31.205.6; Entertainment DAR 15-205.11, FAR 205-14; Cost of Facilities DAR 15-205.12; Pre-contract Costs DAR 15-205.30, FAR 30.205-32; Independent Research and Development, DAR 15-205.35, FAR 31.205–18.

18. 4 C.F.R. § 351 (1983), Cost Accounting Standards.

ernment knowledge and variety of other concepts with lengthy discussions in the professional publications and cases all raise legitimate issues of fact with many opportunities for cost disputes.[19] The cost principles themselves imposes flexibility. "Any direct cost of minor dollar amount may be treated as an indirect cost *for reasons of practicality* . . ."[20] Whatever the accounting system, the results must be equitable.[21]

Common problem areas include direct vs. indirect labor charging, strictly enforced company budgets which encourage mischarging, charging of work associated with IR&D and B&P, changing accounting treatment between contracts and contract types, charging of time in connection with uncompensated overtime, etc. Certain aspects of the regulations have generated more attention than others in the context of mischarging allegations.[22]

The limitation-of-cost clause can be the source of the mischarging problem.[23] Intended to prevent overruns, the clause obligates the contractor to notify the contracting officer when he believes the cost he is incurring will exceed a specified percent of the cost estimate in the contract; or the total cost to the government for the contract performance will be greater than the estimate. The government has no obligation to reimburse the contractor for "overrun" costs until and unless the contracting officer notifies the contractor that the contract cost estimate has been increased.[24] Notice to the government is also an issue in evaluating the reasonableness of the costs. Courts have concluded costs are considered reasonable if incurred during performance of a contract.[25] After being notified of costs, government inaction may preclude later challenging as unrea-

19. *E.g.*, Sanders Associates Inc., ASBCA No. 15518, 73-2 BCA 10,055 (1973) (government could not disallow retroactively inclusion in company-wide overhead pools which costs and treatment were known by the government); Chrysler Corp., NASA BCA No. 1075-10, 77-1 BCA 12,482, *aff'd*, 77-2 BCA 12,829 (1977) (benefit to the government of off-site commercial activity for purposes of allocation of indirect costs). For example, a recent treatise provides a useful overview of this specific area, RISHE, GOVERNMENT CONTRACT COSTS (Federal Publications 1984).

20. DAR 15-202(b) (1983), FAR 31.202(b): For reasons of practicality, any direct cost of minor dollar amount may be treated as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as direct cost.

21. *See* Appeal of McDonnell Douglas Corp., ASBCA No.12639, 69-2 BCA 8063 (1969). Government argued costs should be allocated on a usage basis; Board approved allocation by direct labor, "a method equitable under the circumstances."

22. The areas identified are drawn principally from the areas of dispute which arose in the criminal cases described in Section VII.

23. DAR 7-203.3(a); cost clause, DAR 7-203.3(b); funds clause, FAR 32.704, FAR 52.232-20, 52.232-22.

24. DAR 7-203.3.

25. *See* Bruce Construction v. United States, 324 F.2d 516 (Ct. Cl. 1963). As an example of the flexibility of the principles, a cost otherwise designated as unallowable under the cost principles may become reasonable and allowable under circumstances. General Dynamics,

sonable.[25] The reluctance to notify the government of a potential cost overrun has been the first step in schemes to mischarge costs. Upon reaching the ceiling, the contractor merely shifts the costs to another category to secure reimbursement.

Perhaps the largest area of dispute is the allocation of indirect costs among the various contracts. The general rule is any allocation method which addresses an equitable result is considered acceptable.[27] Four particular standards deal directly with allocation of particular cost elements.[28] The regulations attempt to ignore the particular organizational structure of the corporation and examine the cost benefit relationships of the cost.[29] Consistency in allocation and generally in accounting treatment is the principle that limits the contractor from changing accounting practices when cost limitations or contractor's fixed prices and cost reimbursement contracts make shifting of costs among cost pools or cost periods advantageous.[30] Although equitability remains a guiding principle,[31] the contractor is required to submit a proposal detailing the change.[32]

Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs are another area generating mischarging cost disputes.[33] Both are subject to a cost ceiling, normally the subject of an advance agreement.[34] The very general and broad definitions of these costs make them attractive to contractors to recover costs other-

ASBCA 6899, 1962 BCA 3391. (Payment of $50,000 to city to facilitate and expedite the construction of an overpass, strictly speaking unallowable under ASPR but of benefit to the government.) DAR 15-201.3, FAR 31.201-3 defines Determining Reasonableness.

26. Electronics Corp. of America, ASBCA 4770, 61-2 BCA 3134; Litton System, 449 F.2d 392 (Ct. Cl. 1971).

27. DAR 15-201.4, FAR 31-201-4. When application of contractor's established practice causes an inequitable result in allocation of indirect costs, contractor must revise procedures. CAS 402.50(d).

28. CAS 403—Allocation of Home Expenses to Segments, CAS 410—Allocation of Business Unit General and Administrative Expenses to Fiscal Cost Objective, CAS 414—Adjustment and Allocation of Person Cost, CAS 418—Allocation of Direct and Indirect Costs.

29. DAR 15-201.4, FAR 31.201-4. Allocation disputes are common. *See* Dayton T. Brown, ASBCA 22810, 78-2 BCA 1384, *reconsidered* 80-2 BCA 14543 (allocation of bid and proposal costs and a change in accounting treatment, CAS 401); Texas Instruments, Inc., ASBCA 18621, 21 GC 293, 79-1 BCA 13800 (CAS 401).

30. *See* CAS 401—Consistency in Estimating, Accounting and Reporting Costs. CAS 402—Consistency in Allocating Costs incurred for the Same Purpose. 4 C.F.R. 402.20 prevents contractor from changing practices to increase government contract costs. *See* McDonnell Douglas NASA 873-10, 18 GC 87, 75-1 BCA 11337, *aff'd* 75-2BCA 11,568. Change must be to improve accounting practices and not just to improve cost recovery. American Electric, ASBCA 16635, 76-2 BCA 12151, *revised*, 77-2 BCA 12,792.

31. DAR 15-201.4, FAR 31.20-4

32. *See* CAS 331.120, CAS 402.50(d), DAR 15-203(d)(i), FAR 31.203(d).

33. DAR 15-205.3—B & P, DAR 15-205.35 (IR&D); FAR 31.205-18 (IR&D and B&P costs). DAR permits costs within ceiling to be interchangeable. DAR 15-205.3(c)(1)A; 15-205.35(c)(1)(A) and (B), FAR 31.205-18.

34. DAR 15-205.35(c)(1)(A); FAR 31.205-18.

wise not subject to recovery. In the instance of IR&D, the factual dispute is over whether the costs are related to effort or a particular contract or are truly unsponsored independent research.[35]

Costs which benefit more than one contract can also raise difficult issues of both fact and law.[36] Ultimately after all is said and done, after review of the facts and circumstances, the courts and boards end up focusing on fairness and equitability.[37] In addition to the general flexibility of the cost principles and standards, their application involves numerous factual determinations/judgments by both the contractor and the government. An appreciation of the potential difficulties is available by a simple review of the definition section of the cost principles on such matters as "business unit," "directly associated cost," general and administrative (G&A) expense, "indirect cost pools", "profit center", "segment" and others.[38]

These cost issues surround a particular allegation of mischarging. What normally accompanies the issue is the suspicion that the contractor altered or otherwise falsified the supporting records to conceal the true and proper nature of the costs. The principle and standards require records sufficient to satisfy the objective of accurate cost accounting.[39] Contractors are required to maintain a timekeeping system to control labor costs.[40]

It is in this context of over 500 pages of regulations in just the cost principles in DAR and the FAR and the Standards that the government seeks to tell contractors that they will only be reimbursed for costs incurred or related, directly or indirectly, to work on a particular contract and will not pay twice for the same work. As if anything could add complexity to this, the contracting officer, the auditor and the actual consumer all represent the United States, and all can and do communicate with the contractor on the allowability of costs which relate to such

35. *See, e.g.*, General Dynamics Corp., ASBCA 10254, 9 GC 352, 66-1 BCA 5680 (dispute over whether partially funded research was funded).

36. Cost is allowable if it benefits both the contract and other work and can be distributed in reasonable proportion to the benefits received, DAR 15-201.4, FAR 31-201-4. *See, e.g.*, Appeal of Olin Mathieson Chemical Corp., ASBCA No. 6468, 61-2 BCA 3126 (1961) (contractor attempted to charge the government for new chemical and commercial customer for used chemical. This practice was not disclosed to Army audit; General Electric v. United States, 412 F.2d 1215, 188 Ct. Cl. 620 (1969) (waiver issue).

37. United States v. Litton, 449 F.2d at 392, 399 (Ct. Cl. 1971); Lockheed Aircraft Corp. v. United States, 375 F.2d 786, 796 (Ct. Cl. 1967).

38. DAR 15-109, FAR 31.001.

39. DAR 7-104.41; FAR 15.106-2, 52.214-26, 52.215.2; DAR 7-104.35(f) and (g); FAR 52.232-16; DAR Appendix E-506, E-507; FAR 32.503-2 (progress payments) M.; DAR 7-104.90, FAR 52-243-6; DAR Appendix E-213, E-214; CAS 401, 405, 409, 414, 417; M-201, 201.2, 201.3.

40. DCAM 4-107 discusses audit of timekeeping procedures. Contractor is permitted discretion on method of timekeeping. One of the procedures is "independent floor checks and test employee attendance and the accuracy in recording the work performed on all shifts."

issues as consistency of treatment and estoppel.[41]

III. Criminal Law Standards

The standards for the applicability of the criminal law to cost disputes are set by the particular criminal statutes, their elements, the developing case law, the jury instructions and very importantly, the exercise of prosecutorial discretion.[42] Mischarging commonly arises in a factual context on the various reporting forms for labor effort or material costs such as time cards, labor distribution forms, invoices, etc.[43] The false costs are then reflected in the vouchers submitted to the government pursuant to particular contracts or agreements or on the end of the year overhead reports submitted to the contracting officer and DCAA for review.[44]

The selection of the particular fraud type statute, in part, depends upon the documents in which the mischarging appears. For example, the false statement/concealment statute, 18 U.S.C. § 1001, is used for falsified internal corporate documents. The false statement charge is also available for prosecution of false statements made to the DCAA auditor. The false claims statute, 18 U.S.C. § 287, is best available for prosecuting falsities on the public vouchers. The mail fraud statute, 18 U.S.C. § 1341, can be used in connection with a mischarging scheme involving the mailing of the public voucher or overhead report. The conspiracy statute, 18 U.S.C. § 371, is available for all the above circumstances. A detailed summary of the law with respect to each of these and other applicable statutes would require a more lengthy review than is possible here. However, based on the cases prosecuted to date, it is possible to identify key items in each theory of prosecution that raise particular issues with respect to mischarging violations.

A. False Statement/Concealment

18 U.S.C. § 1001 covers false and fraudulent statements and representations, false writings and documents and concealments by trick scheme and device.[45] This statute is

41. DAR 3-801.2, FAR 15.805-1(A); § 1-201.3, FAR 201.3 defines duties of contracting officer. The contracting officer's authority is very broad. United States v. Mason and Hangar Co., 260 U.S. 323 (1922). The power of the DCAA auditor in looking over the company's shoulder has been enhanced by recent regulation. *E.g.* 3-801.4.

42. For some judicial descriptions of the concept of prosecutorial discretion, *see* Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F.2d (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

43. *See* the variety of forms described in the particular cases subject to prosecution in Section VII.

44. *E.g.*, Standard Form 1034 pursuant to DAR 7-203.4. *See* DAR Appendix F.-100.1034 32 C.F.R. Establishing and the negotiation of overhead rates is described in DAR 3-700ff, FAR 42.700ff.

45. 18 U.S.C. § 1001 (1984):

Whoever, in any matter within the jurisdiction of any department or agency of the United

designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices . . . ."[46] The critical elements for mischarging are knowledge, falsity, concealment, materiality and jurisdiction.

1. *Knowledge*

The element of knowledge pertains directly to the falsity of the particular statement. The government's position has been that there is no need to prove the defendant had actual knowledge of the federal involvement.[47] Proof of knowledge by the defendant of the falsity of a statement on a particular time card or public voucher can be difficult on several levels in a mischarging case. Did the employee know the statement was false? Is the particular effort susceptible to being charged in several different ways? For example, does it relate to another contract; is it a research type effort as well as a direct charge? Availability of different accounting treatments can make proof of knowledge of falsity difficult. Proof of knowledge by the supervisor and at each stage of management up to a senior manager level becomes progressively more difficult. In that regard, principles of circumstantial evidence, causation and corporate liability come into play. However, proof of knowledge at any corporate level can be satisfied by evidence of a reckless disregard for the truthfulness of a statement coupled with a conscious effort to avoid learning the truth.[48] Proof of this nature can arise in the context of management level decisions on the changing of charges without regard for the nature of the particular labor effort.[49]

2. *Falsity*

Perhaps the critical element in any false statement prosecution and

States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

But see also the Criminal Fine Enhancement Act of 1984, Pub. L. No. 98–596.

46. United States v. Gilliland, 312 U.S. 86, 92–93 (1941). There is no requirement to prove pecuniary loss. *See also* United States v. Bramblett, 348 U.S. 503, 507 (1955).

47. This issue was recently addressed by the Supreme Court. United States v. Yermian, ___U.S.___, 104 S. Ct. 2936 (1984). The Supreme Court left open the question what proof of knowledge of the federal interest, if any, is required. *See also* United States v. Baker, 627 F.2d 512, 515–16 (5th Cir. 1980); United States v. Lewis, 587 F.2d 854, 857 (6th Cir. 1978); United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979).

48. United States v. Schaffer, 600 F.2d 1120 (5th Cir. 1977); United States v. Cook, 586 F.2d 572 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); United States v. Jacobs, 475 F.2d 270 (2d Cir.), *cert. denied sub nom.*, Thayer v. United States, 414 U.S. 821 (1973); United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973).

49. *See* particularly the description of the evidence in United States v. Bolt Beranek and Newman, Section VII herein.

especially in the complex accounting area is the proof of the actual falsity of the statement.[50] Here, the flexibility of the regulations and accounting practices makes available the defense that, whatever the intent of the defendant, the statement charged is not literally false. Most courts look to proof of the literal falsity of a statement much like a perjury prosecution.[51] However, several courts have been satisfied with a statement "fairly read" as false.[52] The Eighth Circuit imposed the additional burden on the government to negate "any *reasonable*" interpretation that would make the defendant's statement factually correct.[53]

3. *Concealment*

The charge of concealing and covering up by trick scheme and device can allow the prosecution to avoid the requirement to prove the literal falsity of a statement.[54] However, this theory of prosecution would require proof of some affirmative act constituting the trick scheme or device which is specified in the indictment.[55] Proof that the defendant had a recognizable duty to disclose the information concealed may also be required.[56] In a mischarging case, the cost accounting principles and DCAA's audit rights provide ample authority on the issue of the contractor's duty to disclose material information and makes this particular aspect of the statute particularly adaptable to a mischarging case.

4. *Materiality*

The element of materiality is a legal issue to be resolved by the court. The test is whether the "false statement

50. For a case where prosecution appears to have missed this point, *see* United States v. Race, 632 F.2d 1114 (4th Cir. 1980). The Fourth Circuit reversed a false statement conviction finding that the contractor's billings to the government for per diem were not inaccurate, false or fraudulent but rather were in accordance with the reasonable interpretation of the contract which specifically provided per diem to be paid under the provisions of the Military Joint Travel Regulations (MJTR). The fact that the contractor paid its employees at a lower rate than provided in the MJTR is a matter between the contractor and its employees and not the government. Here, the MJTR per diem rate was $33 per day, the contractor billed at the $33 rate, and the contractor only paid its employees $25 per day. Had the contract called for "actual" expenses, the government might have had a different result.

51. Bronston v. United States, 409 U.S. 352 (1973).

52. United States v. Rodgers, 624 F.2d 1303 (5th Cir. 1980), *cert. denied sub nom.* Anthony J. Bertucci Construction v. United States, 450 U.S. 917 (1981); United States v. Huber, 603 F.2d 387, 398 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). The court held the perjury statute, 18 U.S.C. § 1621, does not reach a witness' answer that is literally true, but unresponsive, even assuming the witness intends to mislead his questioner by the answer, and even assuming the answer is arguably "false by negative implication." The burden is on the questioner to pin the witness down to the specific object of the inquiry.

53. United States v. Anderson, 579 F.2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978).

54. United States v. London, 550 F.2d 206 (5th Cir. 1977). *See also* United States v. Rodgers, *supra* at 1310 (statements literally true but part of a fraud scheme).

55. United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

56. United States v. Muntain, 610 F.2d 964, 971–72 (D.C. Cir. 1979); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); United States v. Irwin, *supra*, at 678–79.

(or concealment) has a natural tendency to influence or was capable of influencing the decision."[57] The government does not actually have to be influenced or to have relied on the false statement.[58] The issue arises most frequently in two ways. One, the contractor asserts that the statement could not have adversely influenced the government because some element of the government was notified of the contractor's accounting practice and may even have approved the accounting treatment. However, the Fifth Circuit held that the materiality element can be satisfied even if the government knew the truth or actually ignored the false statement.[59]

The second way the issue arises and can present a more difficult hurdle for the prosecution is evidence that despite the incorrect/false charge, the net accounting results, if the effort was charged differently, has negligible monetary impact on the United States. Proof of this assertion would require evidence of the correct charge and evaluation and comparison of the accounting consequences. This legal question is discussed further in Section V, Defenses to Mischarging.

5. *Matter Within the Jurisdiction of the United States*

The statement or concealment need not be actually submitted to the United States. The statutory language is a matter "within the jurisdiction of any deparment or agency of the United States." Submission of a false statement to a state agency administering the Medicaid program, or to a private purchaser, a DOE refiner, in connection with its preparation of records which ultimately influenced a federal agency has been found to be sufficient.[60] A statement never submitted to the United States or to any agent of the United States, but made in the records of a corporation, which records could be the subject of federal inspection, may be the vehicle for a false statement prosecution.[61] In the cost accounting area, employee time

57. Weinstock v. U.S., 231 F.2d 699, 701 (D.C. Cir. 1956).

58. United States v. Lichenstein, 610 F.2d 1272 (5th Cir.), *cert. denied sub nom.*, Bella v. United States, 447 U.S. 907 (1980); United States v. Markham, 537 F.2d 187 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). It is not necessary to show that the government agency actually relied on the statement, that the government suffered a pecuniary loss as a result of the false statement in that the false statement was sufficient to induce payment is sufficient. United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983).

59. United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

60. United States v. Beasley, 550 F.2d 261 (5th Cir.), *cert. denied sub nom.*, Kramer v. United States, 434 U.S. 863 (1977); United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); United States v. Bryson, 396 U.S. 64, 70 (1969).

61. United States v. Hooper, 596 F.2d 219, 233 (7th Cir. 1979) United States v. Kraude, 467 F.2d 37 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972). There need be no regulations requiring the retention of the false records, if otherwise shown to be material. United States v. Diaz, 690 F.2d 1352, 1358 (11th Cir. 1982) (subcontractor submitted false welding certificates); United States v. Balk, 706 F.2d 1056 (9th Cir. 1983).

cards and other internal corporate documents, if covered by the audit clause, for example, can be the vehicle for a false statement prosecution of a contractor.[62] The breadth of the statute here adds substantial criminal exposure to the public contractor.

6. *False Statement—Oral*

False statements can be oral as well as written.[63] This would make the responses to the DCAA auditor's interviews the subject of a false statement prosecution.[64] This audit is often preliminary to recognizing a cost accounting question as possibly of a criminal dimension and a criminal referral. The notes of the auditor, corroboration and clarity of the false statement can be critical.

Several courts, apparently fearful that the false statement statute could be used to avoid the limits of the perjury statute, 18 U.S.C. § 1621, have critically examined the prosecutions for oral false statements.[65]

B. False Claim

18 U.S.C. § 287 is identical to the false statement statute in terms of knowledge and intent elements.[66] The statute generally and as applied to mischarging is different in scope. Proof of a claim on the United States for money or property is required.[67] The claim does not have to be made directly on the United States.[68] The courts have expanded this requirement to cover claims on the United States handled by state governments, for example.[69] The government must prove the claim is false, fictitious *or* fraudulent.[70] The need

62. Even a subcontractor's records subject to audit by the United States can support a prosecution. For statutory analysis of similar breadth, see wide range of applications of federal official under the federal bribery statute, 18 U.S.C. § 201 (1984). Dixson v. United States, ___U.S.___, 104 S. Ct. 1172 (1984).

63. United States v. Massey, 550 F.2d 300 (5th Cir. 1977).

64. Exculpatory no cases do not apply to regulatory agencies. United States v. King, 613 F.2d 670 (7th Cir. 1980); United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976). The Supreme Court recently made clear that false statements to an investigator, the FBI, violates 18 U.S.C. § 1001, United States v. Rodgers, ___U.S.___ (No. 83-620 decided April 30, 1984).

65. United States v. Poutre, 646 F.2d 685 (1st Cir. 1980) (testimony of one investigator, discrepancy in investigator's notes); United States v. Clifford, 426 F. Supp. 696 (E.D.N.Y. 1976).

66. 18 U.S.C. § 287:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

67. United States v. Neifert-White Co., 390 U.S. 228 (1968); United States v. McNinch, 356 U.S. 595 (1958).

68. U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

69. United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983); United States v. Beasely, *supra*, at 273 (5th Cir.); United States v. Blecker, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

70. United States v. Blecker, *supra*; United States v. Irwin, *supra*.

to prove the elements of willfulness and materiality are in dispute among circuits.[71] Proof of intent to defraud is not required, only proof that defendant "had the specific intent to do something he knew the law forbade."[72]

In mischarging, the invoice periodically submitted to the government on the contract would be the vehicle for prosecution,[73] and it is uncertain that false charges submitted by a subcontractor would be chargeable unless directly paid by the United States with a treasury check.

Certain aspects of the statute make it a more effective charge. One is the statute does not require proof of materiality.[74] Second, the criminal statute has a direct civil counterpart, 31 U.S.C. § 3729. Conviction has direct collateral estoppel by judgment and *res judicata* benefits for a subsequent civil suit.[75]

C. General Fraud Statutes

These statutes have general application to criminal prosecution of mischarging—mail fraud, 18 U.S.C. §1341, and conspiracy to defraud, 18 U.S.C. § 371.[76] The essential elements generally apply to a mischarg-

71. *See* United States v. Irwin, *supra;* United States v. Milton, 602 F.2d 231 (9th Cir. 1979) (may not need to prove "intent to defraud").

72. United States v. Maher, *supra* at 846.

73. Neither time card nor overhead report is a claim for money.

74. United States v. Irwin, *supra.*

75. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568–69 (1951); Sealfon v. United States, 332 U.S. 575 (1948).

76. 18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both

But see also the Criminal Fine Enhancement Act of 1984, Pub. L. No. 98–596. 18 U.S.C. § 1341:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office of authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

But see also the Criminal Fine Enhancement Act of 1984, Pub. L. No. 98–596. 18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction

ing type fraud case.[77] The required mailing can be satisfied by the mailing of the overhead report or invoices to the contracting officer or DCAA.[78] The law with respect to conspiracy of a corporation with its officers has expanded to permit prosecution in this instance.[79]

The critical element in either statute is the definition of "defraud the United States." The statutory language is not limited and the cases describe the conduct in broad terms.

All the reported cases rely heavily on the definition of "defraud" provided by the Supreme Court in two early cases; *Haas v. Henkel*,[80] *Hammerschmidt v. United States*.[81] While *Hammerschmidt* attempted to limit the effect of *Haas*, circuit courts have relied on both attempts at defining "defraud the United States" to justify federal prosecution.[82]

In *Haas* the Court stated:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government . . . [A]ny conspiracy which is calculated to obstruct or impair . . . [agriculture department] efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of

thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

But see also the Criminal Fine Enhancement Act of 1984, Pub. L. No. 98–596.

77. Essential Elements of 18 U.S.C. § 371 are:

1) That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; 2) That the accused willfully became a member of the conspiracy; 3) That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and 4) That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

2 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 27.08 (3d ed. 1977).

Essential Elements of 18 U.S.C. § 1341 are:

1) The act or acts of having devised, or having intended to devise, a scheme or artifice to defraud, or to attempt to defraud, the United States out of property or money or credit by means of false or fraudulent representations as charged; 2) The act or acts of placing, or causing to be placed, in an authorized depository for mail matter a letter intended to be sent or delivered by the Post Office Department, as charged; and 3) The act or acts of so using or causing the use of the United States mails willfully, and with specific intent to carry out some essential step in the execution of said scheme or artifice to defraud, or to attempt to do so, as charged.

2 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 47.05 (3d ed. 1977).

78. The mailing can also be U.S. Treasury check. United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); United States v. Wilson, 639 F.2d 314 (6th Cir.), *cert. denied*, ___ U.S. ___, 102 S. Ct. 479 (1981).

79. Until recently, the law had been uncertain in this area; *see* United States v. Hartley, 678 F.2d 961 (11th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 815 (1982). United States v. S. & Vee Cartage Co., Inc., 704 F.2d 914, 920 (6th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 343 (1983); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

80. Haas v. Henkel, 216 U.S. 462 (1910).

81. Hammerschmidt v. United States, 265 U.S. 182 (1924).

82. *E.g.* United States v. Thompson, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966).

its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.[83]

In *Hammerschmidt,* Chief Justice Taft, writing for the Court, defined "defraud" as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.[84]

Proof that the United States has been defrauded does not require any showing of pecuniary or proprietary loss.[85] One court noted that 18 U.S.C. § 371 requires only "mission attempted" not "mission accomplished."[86]

The most wide-ranging aspect of the definition of defrauding the United States is the "obstruct or impair legitimate government activity." This type of fraud may take any one of several forms: bribery of a government official to breach a duty owed to the government,[87] misuse of a right or privilege given by the government, thereby obstructing and impairing a governmental function, e.g., granting a permit,[88] administering VA loans,[89] building hospitals,[90] collecting tax,[91] i.e., obstruction by diverting federal funds ". . . from their true and lawful object."[92] *United States v. Thompson*[93] involved a kickback between a general contractor and a subcontractor. *United States v. Hay*[94] affirmed a conviction for the obstruction of an audit for claims submitted to the Government of Viet Nam on a United States loan program. No United States dollars were involved in the fraud.

It is this line of cases which would support a mischarging prosecution on the theory that the DCAA's ability

83. Haas v. Henkel, *supra* at 479–80.
84. Hammerschmidt v. United States, *supra* at 188.
85. United States v. Jacobs 475 F.2d 270 (2d Cir.) *cert denied sub nom.*, Thayer v. United States, 414 U.S. 821 (1973); United States v. Peltz, 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); United States v. Johnson, 383 U.S. 169 (1966); United States v. Anderson, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978); United States v. Hay, 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).
86. United States v. Root, 366 F.2d 377, 383 (9th cir. 1966), *cert. denied*, 386 U.S. 912 (1967). *See also* Cross v. United States, 392 F.2d 360 (8th Cir. 1968).
87. United States v. Glasser, 116 F.2d 690 (7th Cir. 1940), *modified*, 315 U.S. 60 (1942).
88. Wallenstein v. United States, 25 F.2d 708 (3d Cir.), *cert. denied*, 278 U.S. 608 (1928).
89. United States v. Levinson, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).
90. United States v. Thompson, *supra.*
91. United States v. Klein, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).
92. Harney v. United States, 306 F.2d 523, 527 (1st Cir.), *cert. denied sub nom.*, O'Connell v. United States 371 U.S. 911 (1962).
93. United States v. Thompson, *supra.*
94. United States v. Hay, *supra* at 998.

to audit was obstructed irrespective of proof of any direct loss by the United States.[95]

The definition of fraud under the mail fraud statute is equally broad,[96] encompassing the government as a victim.[97] The same acts of mischarging can be found to violate both the false statement and the mail fraud statutes.[98] The proof of the required mailing can be causing the U.S. Treasury checks to be mailed in furtherance of a scheme to defraud.[99]

D. Foreign Corrupt Practices Act

Another statute and theory of prosecution which may be available in the mischarging area are the record keeping provisions of the Foreign Corrupt Practices Act.[100] In the wake of the overseas bribery scandals, the record keeping provisions require public corporations to "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[101] Willful violation of this

95. United States v. Shoup, 608 F.2d 950 (3d Cir. 1979), is an interesting case. A report was technically accurate but alterations obstructed and impaired a government function. Shoup was convicted of conspiracy to defraud the United States by agreeing to deprive the government of the benefits to which it was entitled under a contract between Shoup and the United States attorney, and by agreeing to alter Shoup's report detailing his inspection, findings and conclusions of malfunctioning voting machines. In order to obtain future voting machine business with the city, a meeting was arranged by a former chairman of the Board of Elections for Shoup to meet and discuss his final report with one of the commissioners responsible for overseeing elections, monitoring polling places, and purchasing and repairing voting machines. As a result of this meeting, Shoup modified the tone of his report in order to cast the commissioner in a favorable light. The court ruled that although the final report was technically accurate, the fact that the original language was changed was done to mislead the government in its investigation as the government bargained for an impartial evaluation and Shoup colored his findings to enrich his personal goals.

96. *See* Bronston v. United States, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

97. United States v. Newman, 664 F.2d 12, 19 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 104 S. Ct. 193 (1983). *See* Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1982–83).

98. United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978).

99. United States v. Computer Science Corp., 689 F.2d 1181 (4th Cir.), *cert. denied*, ___ U.S. ___; 103 S. Ct. 729 (1982).

100. Securities and Exchange Act of 1934. 15 U.S.C. § 78a (1981). The 1977 Amendments to the Act enacted the Foreign Corrupt Practices Act of 1977. 15 U.S.C. §§ 78dd-1, 78dd-2, 78m and 78ff(1981).

101. Public corporations that have registered securities and file reports as required by the Securities and Exchange Act and also required to:

> (A) make and keep books, records, and account, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
>
> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

requirement violates the Securities Exchange Act of 1934 imposing criminal penalties.[102] Questions of materiality and the effect of a mischarging on the disposition of the assets notwithstanding, this theory of prosecution raises interesting possibilities in the area of mischarging.

E. Other Offenses

The mail fraud offense is a predicate offense for RICO which is also theoretically available in this area.[103] The ITSP statute, 18 U.S.C. § 2314, also is applicable, through the mailing of the treasury check which was "taken by fraud."[104]

Also available but never used is a provision limited to contractors supplying aircraft parts which provides: whoever by collusion, understanding or arrangement, deprives or attempts to deprive the United States of the benefit . . . of a full and free audit . . . so far as necessary to disclose the cost of executing the contract of the books of a person carrying out a contract under this chapter. . . .

is punishable by a fine of not more than five years. 10 U.S.C. § 2276. The obstruction-of-a-federal audit concept appears in several statutes. It remains a viable response to redress hurdles which auditors may confront in the task of detecting fraud or corruption.

IV. Detection of Mischarging

The detection of alleged mischarging is dependent on the DCAA audit process.[105] With broad scope of ac-

(iii) access to assets is permitted only in accordance with management general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m (1981).

102. (c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

15 U.S.C. § 78ff (1981).

103. 18 U.S.C. § 1961ff.

104. "Whoever transports in interstate or foreign commerce any goods, wares, merchandise securities or money, of the value of $5,000 or more knowing the same to have been stolen, converted or taken by fraud. . . . " 18 U.S.C. § 2314 (1984).

In fraud investigations, corruption can arise violating the bribery statutes 18 U.S.C. § 201ff (1984). In addition to serious criminal penalties the underlying contracts are subject to rescission, 18 U.S.C. § 218 (1984) and Executive Order No. 12448, November 4, 1983. *See also* 41 U.S.C. §§ 51–54, the Anti-Kickback Act (1965).

105. *See* article by then director of DCAA, Fred Neuman, 27 Gov't Acct. J. 1 (1978).

cess to a contractor's records by contract and regulation as well as a physical availability to receive allegations from disaffected contractor employees, the contract auditor is the principal detector of mischarging.[106] The contract auditor for a number of purposes has access and responsibility to examine a contractor's books and records to evaluate the accuracy of costs of interest to the United States.[107] In exercising his right of access and fulfilling his audit responsibilities, the contract auditor normally either receives allegations from an employee or identifies records that raise questions concerning the integrity of the contractor's accounting systems.[108] The floor check has proven to be an invaluable audit technique. Computer examination of contractor charging practices is another approach to verify charging practices.

The responsibilities of the contract auditor in such a position are set out in section 12–701 of the Defense Contract Audit Manual.[109] The auditor who "uncovers or is alerted to any circumstance indicating fraud

106. DAR 7-104.41 audit clause; FAR 15.106-2, 52.214-26, 52.215-2, 7-104.15, FAR 15.106, 52.215-1, GAO examination of records clause. *See* Fenster and Lee, *Expanding Audit and Investigative Power of the Federal Government*, 12 PUB. CONT. L.J. 193 (1982). "If courts fully accept the broad interpretation, there will be virtually nothing left which cannot be examined by the federal government," *id.* at 209. GAO now has subpoena power, 31 U.S.C. § 67(a), and through inspectors general so do government auditors. *See also* 10 U.S.C. § 2313, 42 U.S.C. § 254. In Grumman Aircraft Engineering Corp., ASBCA 10309, 66-2 BCA-846 9 G.C. ¶ 5846, the Armed Services Board of Contract Appeals stated:

> At the same time the Government agrees to pay a contractor's costs of contract performance, it also reserves the right to satisfy itself with reasonable certainty what those costs truly are. When a contractor's obligation is to deliver the Government something for a competitively-arrived-at fixed price, it retains the right to keep its own counsel and strict privacy as to its costs of delivering that item. When, on the other hand, a contractor enters into a contract in which the Governmet agrees essentially to pay him what it costs him to perform, that contractor has also invited the Government into his office to determine what those costs are. Thereafter, a Government auditor looks over his shoulder. The marriage of Government auditor and contractor is not easily dissolvable. The auditor certainly has no right to roam without restriction through all the contractor's business documents which have no connection with the Government contract. But he has a right to satisfy himslf as to items claimed to be part of the costs of performing the Government contract. When the claim is as to an overhead or indirect cost, there may be some necessity to look at entries other than those for labor, material, and equipment used directly in the performance of the Government contract. We conceive of the audit function as a broad rather than a narrow one.

107. DCAA in assisting the contracting officer does proposal evaluations, cost audits, operations audits, defective pricing audits, etc. *See* Berger, *The Scope of DCAA's Audit Authority*, PUB. CONT. L.J. 259. The auditor in most important areas functions as the contracting officer's designated representative. *E.g.* DAR 3-809(1)(e)(i). The right to audit encompasses the right to copy records. SCM Corporation v. United States, 645 F.2d 893 (Ct. Cl. 1981).

108. Floor checking procedures are often most effective in the mischarging area. CAM 4-107. Fenster, *supra*, suggests certian strategies in dealing with the auditor including limiting access to "directly pertinent documents only." This and other such tactics may only exacerbate the cost dispute situation and force the auditor to refer the matter to an investigator to pursue.

109. CAM 12-700 describes special reporting requirements for "Fraud and Other Unlawful Activities." The procedures have been in place since 1965. In 1977, DCAA published Auditors Responsibility for Fraud Detection, DCAA p 7641.56, June 1977.

or other unlawful activities" is charged with a duty to pursue using "generally accepted audit procedures." This does not include any investigative responsibility. The auditor is required to carefully protect the information and pursuant to a recent memorandum is required to notify an investigative field unit promptly. The auditor prepares a formal "12–701 report" describing the suspected fraud and the amount of money involved. The report is transmitted to the required director and then the headquarters of DCAA before the fraud referral to an investigative unit.[110]

Copies of all referrals are also sent to the Defense Logistics Agency (DLA) and the Fraud Section of the Criminal Division.[111] DLA functions include the Defense Contract Administrative Service (DCAS). The contracting offices in DCAS administer over $140 billion in contracts of the military departments. In one sense, these contracting officers are the victims of the mischarging crime. For that reason, the DLA general counsel has played a critical role in identifying the most promising mischarging cases and providing expertise to the investigators and prosecutors, as well as coordinating the various criminal, civil and administrative actions.

The investigation of mischarging cases is conducted similarly to other white collar crime cases utilizing the grand jury and immunity as tools to identify corporate and senior management responsibility.[112] The contractor is also subject in this area to an inspector general subpoena with broad application and without the several limitations of the grand jury subpoena.[113] In fact, there is no legal limitation on the inspector general using subpoena power in aid of DCAA's contract audit mission.[114]

Obviously, the decision to proceed with an investigation is based on the unique facts of each case. In addition to the elements of the offense, con-

110. Memorandum of Understanding between DCAA and DOD Investigative Agencies signed in May 1983 per Starrett testimony, *supra* note 8.

111. The Procurement Fraud Unit in the Fraud Section of Criminal Division is notified of every DCAA referral.

112. A corporation has no Fifth Amendment privilege with respect to production of records. However, the Supreme Court recently held that the act of production by a corporate official can be privileged in certain circumstances. United States v. Doe, ___U.S.___ (No. 82-786, decided, February 28, 1984).

Computer managed cost systems present more difficult detection problems. Ability to permanently erase charges may frustrate routine historical investigations leaving search warrant under Rule 41, FED. R. CRIM. P., as an alternative.

113. 5 U.S.C. App. 1 § 6(a)(4) (1983). Note the information gathered by this process does not impose secrecy limitations similar to FED. R. CRIM. P. 6 covering grand jury rules and procedures.

114. There can be some potential parallel proceeding issues to an investigation using DCAA, the inspector general and the Department of Justice. For an outline of the legal principles on this issue, *see* Graham, *Suspension of Contractors and Ongoing Criminal Investigations*, 14 PUB. CONT. L.J. 216, 230–234 (1984); SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980).

sideration may be given to the conduct and the attitude of the contractor in his dealings with the DCAA auditor. Making the distinction between a contractor acting in good faith (perhaps mistaken) versus the contractor who intends to defraud is much easier if there is evidence the contractor concealed facts and documents from the DCAA auditor or put forth false stories explaining particular transactions.[115]

V. Defenses to Mischarging

Defenses to any criminal offense obviously arise in the context of the underlying facts and circumstances of each case. However, the mischarging case arises in an environment in which certain defenses commonly appear. These defenses generally relate to the legal and policy issues of intent to defraud, the absence of any financial damage to the United States and questions of corporate responsibility.

A. Intent to Defraud

The jury instructions for several of the applicable statutes require specific intent to defraud the United States.[116] This has been defined to mean to "cheat Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." The jury instructions for any applicable criminal statute also require proof that the criminal act was done intentionally, not by mistake or accident.[117]

115. The obstruction of justice statutes do not apply to the DCAA audit process, *see* 18 U.S.C. §§ 1503, 1505, 1510 and 1512 (1984), but certainly conduct suggesting intent to obstruct and impair the government's attempt to ascertain true costs is probative of intent to defraud. *See also* 10 U.S.C. § 2276 which prohibits obstructing audits on certain Air Force contracts.

116. Jury instructions on intent to defraud:

> To act with "intent to defraud" means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself. However, the evidence in the case need not establish that the United States or any person was actually defrauded, but only that the accused acted with the "intent to defraud."
>
> An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do someting the law forbids; that is to say with bad purpose either to disobey or to disregard the law.

DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 1605 (3d ed. 1977); United States v. Peden, 556 F.2d 278 (5th Cir.), *cert. denied*, 434 U.S. 89 (1977).

117. Jury instructions on criminal intent provide:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids [knowingly failed to do an act which the law requires], purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case. An act or a failure to act is "knowingly"

Under this rubric several defenses may appear. One of the most relevant is that the cost principles or the contract permit flexibility in accounting treatment.[118] A second defense along similar lines is the contracting officer, agency official or DCAA auditor was notified of the accounting treatment and approved its use.[119] In certain circumstances, it may be alleged some government person even suggested the accounting treatment that is now the focus of a criminal investigation. The defendant in *United States v. Maher* claimed he mischarged "for a legitimate business purpose" and without a motive to defraud. The jury and later the Fourth Circuit were unconvinced.[120]

One approach, circumstantial in nature, is the pattern of mischarging itself. Corporations susceptible to mischarging allegations include those with effective accounting controls and others with ineffective controls. For those contractors with ineffective controls, close examination of accounting practices may show no consistent pattern of mischarges or as many mischarges in the favor of the government as to the prejudice of the government. Such a circumstance usually belies a conscious scheme to defraud.[121]

done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.03 (3d ed. 1977). *See* United States v. Bishop, 412 U.S. 346 (1973); United States v. Maher, 582 F.2d 842 (4th Cir. 1978); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

118. The flexibiity of the regulations makes it possible that a contractor intends to mischarge but on closer examination the cost principles, the standards of the contract makes the treatment allowable. In such a situation, the defense of legal impressibility is raised. "One cannot defraud another into paying money which that other person is obligated by law to pay." United States v. O'Brien, 501 F. Supp 140, 143 (E.D. Pa. 1980); *see also* United States v. Bagnorial, 665 F.2d 872, 895 (9th Cir. 1981); United States v. McInnis, 601 F.2d 1319 (5th Cir. 1979); United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976); United States v. Berrigan 482 F.2d 171 (3d Cir. 1973); United States v. Johnston, 543 F.2d 55 (8th Cir. 1976).

119. Government condonation is a question for the jury. United States v. Allison, 555 F.2d 1385 (7th Cir. 1977). Jury found no condonation for contract to submit a false statement for reimbursement where defendant submitted a xerox copy of a check together with a certification of the expenditure where the defendant "had not yet at least" expended the money, even though the government permitted contractors to submit xerox copies and uncancelled checks. Entrapment is no defense. United States v. Graves, 556 F.2d 1319 (5th Cir.), *cert. denied*, 435 U.S. 923 (1977), Worthy v. United States, 328 F.2d 386 (5th Cir. 1964).

120. United States v. Maher, *supra* at 844.

121. Circumstantial evidence jury instruction:

There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 1502, (3d ed. 1977.)

B. Loss/Financial Damage

The defense that the mischarging identified by the auditors caused no financial damage to the United States arises in several different ways, all obviously depending on the facts of each situation. The most direct circumstances in which this defense arises is a situation wherein the mischarging occurs to both the benefit and the prejudice of the United States with no net loss of funds after all the costs are properly accounted for.[122] A second circumstance is the movement from one government account to the other, each account within the amounts budgeted by the government. In this circumstance, the contractor can argue that the government spent what it intended to spend to purchase a particular produce or effort which presumably satisfied the government. The contractor can assert he was paid only for actual effort with no damage to the United States. A similar situation arises when effort on one contract for one agency is charged to a second agency, often usually a cost contract which is within any cost ceiling or in certain circumstances contracts without any cost ceiling.[123] The same argument can be made in terms of government benefits and contractor enrichment.

These defenses highlight a basic limitation to many mischarging cases. Does the case concern a contractor charging for effort or materials which did not actually exist or were incurred as "ghost" effort or materials or is the issue simply the accounting treatment of actual effort incurred for the benefit of the government?[124] Although not technically dispositive, these issues may affect whether the government elects to proceed criminally or relies on civil or administrative remedies.

C. Corporate Responsibility

Questions of corporate responsibility raise both a legal and policy question relating to the use of the criminal remedy. Often the mischarging is accomplished by employees with no direct personal profit. Management's first response may be to blame "lower level" employees for mistakes in judgment and argue no involvement of senior management. The factual support for this position may influence the government's willingness to settle on particular terms even if the fraud is supported by evidence, but it has not always precluded prosecution of the corporation.[125]

A corporation is criminally culpable under the *respondent superior*

122. Loss of money not critical for fraud statutes which include notion of obstruct and impair. *See* notes 44 to 95, *supra*.

123. Government can argue that mischarge distorts the rate and/or frustrates ability to distinguish accurate and inaccurate charges—obstruct and impair theory.

124. A basic limitation of some of these cases is that there is no doubt the effort was expended, the cost was incurred.

125. *See* terms of Sperry disposition, Section VII herein.

theory if an agent, while intending to benefit the corporation, commits a crime within the scope of his employment.[126] Conduct of an agent, even if forbidden by a corporation, binds the corporation if such conduct falls within the scope of the agent's employment.[127] It is not necessary that the corporation actually receive any benefit from the alleged act.[128] This includes a wide range of business entities from your major defense contractors to family businesses. In a small business it can be expected that the senior officials of the firm may be involved in the cost accounting practices. Their involvement in the operation of the business, and their self interest in the financial status of their business make corporate responsibility for their acts not as difficult.

VI. Settlement of Mischarging Cases

From the latter description of the prior prosecutions, it should be clear that the effective resolution without a trial of a criminal mischarging case requires consideration of three separate areas—the criminal case, repayment of moneys owed the United States and correction of the internal corporate management to avoid recurrence.[129]

A. Criminal Case

Criminal mischarging cases are settled much like any other fraud case. Two critical areas repeatedly appear in the prior mischarging cases. Will the government require a plea of guilty by the corporation alone or

126. New York Central and Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909); although it is necessary to prove a corporate agent has the *mens rea* required by the criminal statute in question, *e.g.* United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Basic Const. Co. 711 F.2d 570, 572–73 (4th Cir.); *cert. denied*, 104 S. Ct. 371 (1983), it is not necessary to show that any one agent possessed the criminal intent. Corporate criminal intent can be established by combining the knowledge of federal agents. Inland Freight Lines v. United States, 191 F.2d 313, 314 (10th Cir. 1951); United States v. TIME-D.C. Inc., 381 F. Supp 730, 738 (W.D. Va. 1974). Further a corporation can be held criminally liable for the criminal acts of its agents regardless of the agent's position. Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

127. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir.) (1972), *cert. denied*, 409 U.S. 1125 (1973); United States v. American Radiator and Standard Sanitary Corp., 433 F.2d 174, 205 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); United States v. Armour and Co., 168 F.2d 342 (3d Cir. 1948).

128. United States v. Beusch, 596 F.2d 71, 877 (9th Cir. 1979); United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.) *cert. denied*, 337 U.S. 959 (1949).

129. Settlements in all the aspects of a case are often in the best interests of one or both parties. Settlements of a global nature require discussions with more than one government agency. The value to the corporation is to terminate all litigation which in fraud matters has both direct and indirect costs in terms of borrowing ability as well as corporate reputations. It should be noted that in only one of the cases described in Section VII did the defendants contest the charges in a trial. The government has a number of options on a plea including:

1) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

2) agree that a specific sentence is the appropriate disposition of the case.

will settlement involve a plea by a corporate officer? If a corporate officer pleads, what agreement can be reached as to a sentence of imprisonment?[130] The factors in these decisions necessarily are based on the facts of individual cases and standard considerations such as the strength of the case, evidence of individual culpability, amount of money involved, personal profiteering, willingness to cooperate in other investigations or prosecutions, etc.[131]

The terms of a particular plea can effect the civil and administrative ramifications as well. The number of counts of an indictment and the nature of the admissions by the corporation at the time of plea can reflect on the seriousness of the offense in the view of the prosecutor and the availability of good faith type defenses in other related proceedings.[132] The government generally objects to nolo contendere pleas.[133] Pleas intentionally or unintentionally can turn into "Alford" type pleas.[134] That is, a guilty plea by a defendant who nevertheless continues to claim to be innocent. Like nolo contendere pleas, the prosecutor is generally directed to object to pleas on this basis.[135] However, in the context of providing a factual basis for the plea, the defendant corporation or individual in this at times complex accounting may resist admitting any intention to defraud the United States.

B. Civil/Administrative/ Restitution

Repayment of the money or restitution is a major concern of the government in mischarging matters. The referral process often provides the contractor the opportunity to settle a dispute before it reaches the prosecutor. However, in most cases which proceed to indictment, the dispute on liability remains outstanding during the course of the investigation and settlement.[136] Settlement civilly by agreement is available in three ways—administrative, civil agreement, and restitution in the context of the criminal prosecution.

Administrative—All but one of the mischarging cases have been settled utilizing the authority of DCAA

130. Fed. R. Crim. P. 11(e).

131. Principles of Federal Prosecution (1980).

132. *See* Sperry, Section VII herein.

133. Principles of Federal Prosecution, Part E., Opposing Offers to Plead Nolo Contendere; Fed. R. Crim. P. 11(b) provides "Such a plea shall be accepted . . . only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

134. North Carolina v. Alford, 400 U.S., 25 (1970). The court held that an accused may consent to a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence when he intelligently concludes that his interests require a guilty plea and there is strong evidence of guilt.

135. Principles of Federal Prosecution (1980).

136. General government practice is that all settlement process is under control of prosecutor. If settlement interferes with investigation, it is prohibited. *See* Attorney General Memorandum to Heads of all Departments and Agencies in Executive Branch, June 4, 1980.

and the contracting officer to effect readjustment of costs charged to the government pursuant to the provisions of the Contract Disputes Act.[137] This approach is often most efficient and allows a settlement based on the accounting details which were the subject of the initial audit and referral.[138] The government has only the right to be made whole with no penalty assessment.

Civil—Civil settlement of a mischarging case is in the context of a criminal false claims suit filed by the United States against the contractor under the Civil False Claims Act[139] or the Contract Disputes Act.[140] The civil false claims statutes provide for double damages and a forfeiture of $2,000 per false claim. Inasmuch as each public voucher can be an individual false claim, the exposure to civil liability can be several times the amount of the mischarging.[141] In addition, if a claim is found to be false in any respect, the contractor may be required to forfeit the entire amount of his claim.[142]

Criminal Restitution—In October 1982, the Victim Witness Protection Act of 1982 became effective.[143] Among its provisions protecting the interests of victims and witnesses, it gave the court the power to impose restitution in conjunction with any other sentence for offenses occurring after January 1, 1983.[144] The pre-sentence report required under Rule 32 of the *Federal Rules of Criminal Procedure* now must contain a Victim Impact Statement to be used to determine the amount of restitu-

137. Contract Disputes Act, 41 U.S.C. § 605 (1983), and Form 1, Notice of Contract Costs Suspended or Disapproved, DCAM, note 36 ¶ 8-1001. DAR 3-809(c)(1)(i); 1-514(c). In fact, costs can be disallowed and contractor terminated for failure to comply with the access to records clause. American Business Systems, GSBCA 5140, 80-2 BCA 14461 (default for failure to maintain records and refused to disclose records, treated time and material contract differently from flat rate contract). A recent Board decision held that the government must follow the due process procedures under the Debt Collection Act of 1982, 31 U.S.C. 3716 in exercising the right of offset. DMJM/Norman Engineering Company, ASBCA 28145, 84-1 BCA (March 2, 1984).

138. *See* agreement in Bolt Beranek and Newman, Section VII.

139. 31 U.S.C. § 3729.

140. U.S.C. 604 provides:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he should be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to receiving said part of the claim.

141. Each voucher can be considered a false claim with substantial forfeiture liability. United States v. Bernstein, 423 U.S. 303 (1976).

142. 28 U.S.C. § 2514. At least for claims pursued in the court of claims, Corkle v. United States, 94 F. Supp 908 (D.S.C. 1951). *See also* Wagner Iron Works v. United States, 174 F. Supp. 956 (Ct. Cl. 1959) (forfeit entire claim). There are several laws giving the agencies authorities to administratively sue for false claims. 40 U.S.C. 1320a-7a (1982); 7 U.S.C. 2021 (1983); 7 U.S.C. 9a (1980).

143. 18 U.S.C. §§ 3579-80 (1983).

144. Obstruction provisions may be of interest. They arise in these cases as employers try to coax cooperation of employees. 18 U.S.C. § 1512 (1984) prohibits "misleading conduct toward persons to influence testimony or cause to withhold testimony or documents or evade legal process. . . ."

tion. Although the act addresses individual victims, the Department of Justice's position is that it also includes a governmental entity.[145] However, only the amount of the mischarging can be recovered in this fashion.

Criminal Fine—Under the Criminal Fine Enforcement Act of 1984, Public Law No. 98-596 signed by the President on October 30, 1984, the fines for offenses of the federal criminal statutes for felonies have been enhanced to $250,000 for individuals and $500,000 for corporations. The Act also gives the court the power to assess a fine up to twice the loss or the gain as a result of the mischarging (18 U.S.C. § 3623).

C. Suspension/Debarment

The administrative remedy of suspension and debarment is a necessary subject of any global settlement in this area.[146] Mischarging by its nature is not a likely candidate for suspension while an investigation is ongoing—assuming the product is adequate and the contractor has not obstructed justice in connection with asserting its position on the appropriateness of the costs.[147] However, post indictment and certainly post conviction, suspension or debarment become a more likely event absent some resolution. How far the agency is willing to go in joining with the Justice Department varies.[148]

The question of legal fees in defending a mischarging investigation has been the subject of several settlements prior to the new cost principle on the subject.[149]

D. Coordination of Settlement

There are several practical problems for both the contractor and the prosecutors in developing an agreement to resolve financial questions. The first is the general rule that the grand jury cannot be used for civil proceedings,[150] and the criminal investigation cannot be used to effect a civil settlement.[151] This usually imposes on the contractor who is a target of a mischarging investigation to raise the topic of civil resolution,[152] and the prosecutor to have another

145. DOJ Guidelines of Victim Witness—Attorney General, July 9, 1983.

146. DAR 1-600, 41 C.F.R. 1-1.600 (1983), FAR 9-400ff, *see* Graham, *Suspension of Contractors and Ongoing Criminal Investigations*, 14 PUB. CONT. L.J. 216 (1984).

147. Present responsibility is the issue. Suspension to protect the interests of the United States would be difficult to support if the cost issues were at all difficult and the quality of the product was satisfactory.

148. Section VII. In Bolt Beranek and Newman, the Department of Justice recommended no debarment. In Sperry, the government agreed not to debar accompanied by corporate corrective measures.

149. Cost principle on legal fees, 32 C.F.R. DAR 15-205.52 (1983), FAR 31.205.47, makes costs unallowable if a conviction is secured.

150. United States v. Sells Engineering, Inc., ___U.S.___, 103 S. Ct. 3133 (1983); United States v. Baggot, ___U.S.___, 103 S. Ct. 1356 (1983).

151. United States v. Kordel, 397 U.S. 1 (1970).

152. United States v. Litton Systems, Inc., 573 F.2d 195 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978). The prosecutor initiated settlement discussions with Litton's counsel pre-indictment

element of the government, contracting officer, agency attorney or the Civil Division, conduct the negotiation. Secondly, the information which would form the basis for a settlement decision to be made by the contracting officer, agency attorney or Civil Division is often covered by grand jury secrecy. The Supreme Court in *Sells* greatly limited even disclosure to the Justice Department's Civil Division.[153] Several approaches are available to solve this problem with respect to the documents underlying the mischarging allegation but each requires some legal gymnastics.[154]

The other practical problem is reaching an agreement on the amount of restitution. Effectively, the agreements reached to date generally place the contractor in a position to make full restitution and reliance on the amounts identified by DCAA.[155] The opportunities to argue technical accounting issues are generally foreclosed if the dispute has reached the criminal stage.

VII. Review of Cases

All the major mischarging cases filed to date, with one exception described below, have been settled without a trial or any appeals which would indicate any particular judicial acceptance or rejection of the underlying legal issues. However, a review of the cases settled will disclose the selection standards of the prosecutor, areas of settlement, and perhaps indicate some predictability of treatment of defense contractors.

United States v. Sperry Corporation, Criminal No. 4-83-94, D. Minnesota—On December 9, 1983, Sperry Corporation pleaded guilty to three false statement counts in individual Progress Payment Requests submitted to the Air Force.

a) In an Offer of Proof filed at the time of plea, the government alleges that from August 1980 to July 1981 Sperry employees falsely filled out time cards indicating work on an Air Force contract which was below the

with the understanding that the criminal investigation would proceed. After Litton initially agreed to the terms of the proposal and the government disclosed its evidence to Litton, Litton complained of being threatened with indictment if it did not abide by the proposal and then rejected the proposal. Three months later Litton was informed an indictment was imminent and, in response, expressed a desire to reinstitute settlement negotiations along the lines of the initial proposal. The government refused and the indictment followed. Here, the Fourth Circuit concluded that the government's use of the grand jury as a bargaining tool did not violate Litton's due process rights. However, prosecutor must be careful not to be subject to a charge that the grand jury is being misused. A better practice is for the target to seek a settlement.

153. Generally the government asserts pre-existing business documents are not subject to FED R. CRIM. P. 6(e) disclosure. *See* United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979).

154. One approach is to return the documents to the corporation. A second is a Rule 6, FED. R. CRIM. P., order based on the plea agreement which dictates that a settlement will be reached. The proceeding is the underlying criminal prosectuion.

155. *See* Bolt Beranek and Newman settlement.

contract ceiling price when, in fact, their work was properly chargeable to B&P and IR&D costs which were over their ceiling. These false costs were then contained in the Progress Payment Requests submitted to the United States. Subsequently, the government expanded its description of the case in a "Government's Memorandum Concerning Plea Agreement." The memorandum states that DCAA reported deficiencies in the company's labor costing practices to the Justice Department and estimates $258,000 in overcharges. For a year the investigative team consisting of a DCAA auditor, DOD investigators and a prosecutor examined 32,000 documents and interviewed forty persons. Employees identified a program manager as responsible for the mischarging. The contractor asserted no criminal intent pointing out that the B&P work was done by employees who were required to be available for work on the contract even on days their services were not actually needed, and that the contractor completed the contract satisfactorily and under the targeted price and, most importantly, "government contracting officers permitted contractors to charge one contract for labor hours actually expended on another project so long as the projects were so similar there was a potential benefit to both." In its memorandum, the government pointed to difficulty in disproving expenses, numerous regulations, hundreds of Board cases interpreting standards and regulations, and the low corporate level of the program manager as justifying only a corporate plea, civil and administrative settlement and no prosecution of any individuals.

b) Sperry agreed to plead guilty to three counts, pay a maximum fine of $30,000, double damages of $650,000, and $167,740.86 as interest on the double damages. It also agreed to discipline its employees, reduce its claim for recoverable legal expenses by $300,000 and take certain administrative steps to avoid the problem in the future.

c) The administrative steps are enumerated in a separate administrative settlement agreement between Sperry and DOD and include the formation of an internal auditing office responsible for monitoring costs. This audit office will perform regular and surprise audits which results will automatically be made available to DOD auditors. The corporation also agreed to form an Ombudsman's office to report future instances of mischarging. Sperry further agreed to give DCAA complete access to its records and employees including "unscheduled interviews." The Air Force on behalf of itself, the Navy, Army and DLA agreed not to suspend or debar Sperry.

United States v. Rockwell International Corporation, Civil No. 82-6153, D.C., California—On November 29, 1982, the corporation consented to an injunction for violation of the civil false claims statute, 31 U.S.C. 231, in

connection with NASA and Air Force contracts and paid $500,000 in civil settlement.

a) Rockwell was accused of falsifying labor charges on employee time cards by directing employees to charge their labor hours to cost-plus contracts when, in fact, labor was performed on fixed price contracts. The false time cards were subsequently used to prepare false and fraudulent invoices submitted to NASA for payment on the cost-plus contracts.

b) Criminal prosecution was deferred in favor of civil action. Pursuant to the civil settlement, Rockwell agreed to refrain from making further false claims and to pay $500,000 in civil damages.

c) The agreement also involved a number of administrative reforms to Rockwell's audit and timekeeping practices, including the adoption of DCAA established audit procedures, surprise audits by Rockwell's internal audit staff, availability of all internal audits on time or labor charges to DCAA, self-monitoring of the effectiveness of its audit procedures, and reporting incorrect charges on government contracts to DCAA. Rockwell also agreed to revise, at its own expense ($1 million) its timekeeping systems which would allow employees to personally record time and labor charges, allow for verification audits and provide DCAA access to these systems. Rockwell further agreed to notify its employees of their obligation to report allegations of mischarging to DCAA or NASA/IG, produce and show at its own expense a film for employees on the importance of accurate time charges, and provide the United States attorney access to records and employees relating to time or labor charges.

United States v. Kinton Inc., et al., Criminal No. 81-159-A, E.D. Virginia—On September 15, 1981, the corporation and its secretary/treasurer pleaded guilty to false claim charges in the E.D. Virginia.

a) The scheme involved the charging of employees' time working on firm-fixed-fee contracts to cost-plus-fixed-fee contracts. The corporation was charged with false claims on public vouchers for direct labor including overhead submitted to the government on contracts to develop personnel testing and training materials. The falsified vouchers were prepared from altered and falsified employee time sheets which misrepresented the number of hours worked on certain contracts. In an offer of proof at the time of the plea, the government stated that a motivation was that "Kinton had a policy of not overrunning contracts in order to enhance its reputation with the government and thus improve the chances of getting additional contracts." It was Kinton's routine practice to switch costs from one contract to another to avoid cost overruns and cover-up the switching by falsifying time records.

b) Kinton agreed to plead guilty to three counts, pay $30,000 in criminal fines and $40,000 in an ad-

ministrative settlement. Kinton's secretary/treasurer also pleaded to one count.

c) The administrative settlement agreement entered into between Kinton and the Air Force defers debarment proceedings against Kinton provided that it adhere to certain administrative conditions. The secretary/treasurer, however, consented to be debarred and agreed not to serve as a corporate officer, be involved in preparing invoices submitted to the government, participate in internal accounting, timekeeping or other financial controls, exercise managerial tasks relating to government contracts, or accept employment as a corporate officer of any organization involved in government contracting. Pursuant to the settlement agreement, Kinton agreed to issue a Code of Business Ethics to its employees, engage an independent CPA to annually review the corporate accounting system and audit procedures and report its findings to DCAA and the Air Force Debarment and Suspension Review Board, employ a financial management consultant to improve Kinton's financial accounting and administrative procedures who will also report to DCAA and the Air Force, provide access to all books, records, plants and facilities relating to all government contracts.

United States v. Bolt Beranek & Newman Inc. (BBN) et al., Criminal No. 80 Cr.5, D. Massachusetts—On November 12, 1980, the corporation and two vice-presidents pleaded guilty to conspiracy and false statement charges.

a) The scheme involved the manipulation of the indirect costs: BBN charged direct costs which "had exceeded or were about to exceed the planned direct contract costs"; changed overhead and general and administrative costs at the end of the fiscal year "to conform to amounts originally budgeted ..... and secure increased reimbursement. . . . ," and concealed those accounting practices from DCAA by altering time sheets, travel vouchers, invoices, requisitions and accounting records. Two of the false statement counts were the overhead submissions and ninety-six were the time sheets of individual employees which identified hours and false charge numbers.

b) The corporation pleaded to 100 counts, paid $1.7 million in an administrative settlement and $706,000 in criminal fines. The two vice-presidents pleaded to two counts, and each paid $20,000 in criminal fines.

c) The plea agreement provided no further civil or criminal proceedings would be initiated against BBN for the years included in the charges and also that if any governmental agency requested, the Department of Justice would advise that "in its opinion it is not in the best interest of the United States . . . . to suspend or debar BBN as a result of transactions giving rise to said conviction." The Department, however, left the decision on debarment to the particular

agency and pointed out this was based on "its familiarity with the facts of the case, but not upon a similar familiarity with the quality of BBN's work."

United States v. Bradford National Corporation, Criminal No. 81 Cr.870, S.D. New York—On December 24, 1981, the corporation pleaded guilty to a twenty count information in the Southern District of New York charging violations of the false claims statute with respect to twenty public vouchers.

a) The scheme involved shifting of labor costs incurred on government or private cost ceiling or cost-type contracts to government contracts when the cost ceiling was reached. Time sheets were altered, replaced and signed in blank. Invoices, receipts and travel vouchers were also changed. The result was the Department of Defense paid for labor costs of other agency and private contracts. In a lengthy "Government's Memorandum Concerning Guilty Plea," the government stated that the scheme was detected by DCAA auditors who identified "numerous irregularities" in the time sheets. The investigation lasted almost three years and disclosed an extensive pattern of charges evidencing the alterations were "not accidental or random, but a calculated effort to deceive Government auditors and contracting agencies." The government estimated the mischarging amounted to $750,000 and that high cost ceiling government contracts served as "dumping grounds" for cost overruns. According to the government, Bradford defenses included employee error, overtime hours not billed and overlap of contracts.

b) Bradford as part of a criminal and civil settlement pleaded guilty to twenty counts, agreed to pay the maximum fine of $200,000, repay $750,000 mischarged, pay an additional $100,000 in civil forfeitures and in compromise and settlement of its civil liability. In its memorandum, the prosecutors explained their decision not to prosecute any individuals was based on the lack of evidence of personal venality or personal profiteering, Bradford's agreement to sanction employees, "the size and complexity of the case, and the consequent difficulty and expense of a trial."

c) Pursuant to the administrative settlement, Bradford agreed to terminate, demote or otherwise sanction the employees the government believed to have participated in the scheme, institute management procedures to prevent future false billings, agreed to forego $500,000 in claimed reimbursement for legal fees allocated to the investigation. The DOD agreed not to bar Bradford from future defense contracts based on the facts underlying their investigation. A significant part of the disposition was the enhanced administrative controls imposed under the "Administrative Settlement Agreement" negotiated by the general counsel of DLA. These included new written accounting and

timekeeping procedures, personnel changes, public notice to employees, internal audit committee semi-annual reports to DCAA, appointment of an independent controller, and a provision to provide DOD with access to records, personnel and facilities.

United States v. Raycomm Industries, Inc., et al., Criminal No. 82-251, D. New Jersey—On August 9, 1983, the corporation pleaded guilty to a conspiracy charge and its president and executive vice-president each pleaded guilty to one false statement count of a nine count indictment.

a) The indictment alleged that Raycomm fraudulently inflated the hours chargeable to the Army, prepared false public vouchers for labor and materials not properly chargeable to the Army, altered time cards and other supporting documentation and received in excess of $1 million of fraudulent reimbursements as a result of the mischarging scheme. Each false statement count related to individual public vouchers falsely representing the costs for labor and materials which were presented to the Army for payment in performance of Raycomm's performance of a "Time and Material" contract.

b) The corporation agreed to plead to the conspiracy to defraud count and paid a criminal fine of $10,000. The two corporate officers agreed to plead to one false statement count and each was placed on three years' probation and ordered to pay criminal fines totalling $10,300.

c) Prior to its plea, Raycomm had been engaged in extensive civil litigation which was stayed pending the conclusion of the criminal case. As part of the settlement of the civil suits in which Raycomm and the United States were both plaintiffs and defendants, Raycomm agreed to pay $750,000 to the United States as a compromise settlement. The agreement settled all matters in dispute except three contracts which were currently being audited and was contingent on the execution of the criminal plea agreement. The settlement agreement did not limit the government's right to debarment or suspension and Raycomm agreed not to seek reimbursement for the litigation costs in either the criminal, civil or administrative proceedings. These litigation costs included costs incurred in its representation as well as the representation of its employees.

United States v. Rockcor, Inc., Criminal No. CR-84-102C, W.D. Seattle—On April 27, 1984, Rockcor, Inc., pleaded guilty to a six count indictment charging mail fraud, false claims and false statements in connection with Rockcor's timekeeping practices.

a) In an Offer of Proof filed at the time of plea, the government alleged that from 1977 to 1980, Rockcor manipulated labor and other miscellaneous costs which were ultimately charged to government "cost-type and fixed-price" contracts and to

accounts for administrative expenses paid by government contracts. Rockcor improperly billed cost overruns to other government cost-type contracts or accounts which had not reached their ceilings, altered employee time cards, and directed employees not to charge labor actually performed. The pattern of employees' charging labor costs to unrelated contracts also existed with travel vouchers and travel expenses. By shifting costs to other government cost-type contracts and non-ceiling contracts, Rockcor obtained reimbursement for costs which, if billed properly, should have resulted in a loss to Rockcor.

b) Rockcor agreed to plead guilty to one mail fraud, two false claims and three false statement counts, pay criminal fines of $51,000, restitution of $181,000, double damages of $362,000, and interest in the amount of $37,000.

c) Pursuant to the plea agreement: (1) certain legal costs amounting to $250,000 associated with the investigation, defense and settlement of matters to which Rockcor pleaded guilty were treated as unallowable for government contract purposes; (2) the United States was not precluded from proceeding against Rockcor in connection with the enforcement of revenue laws or proceeding administratively or civilly against Rockcor for matters unrelated to the plea agreement; (3) Rockcor is continuing to monitor its labor and costs controls and will implement additional controls as necessary and required by DOD; and (4) no debarment or suspension action was taken as a result of the guilty pleas or matters settled by the plea agreement. In addition, Rockcor has taken a number of administrative steps with the concurrence of DCAA, to improve its internal controls including holding seminars for supervisors, project managers and workers on revised and correct timekeeping procedures, voluntary implementation of a new computer-based cost control and information system, hiring of its own full-time internal auditor, providing DCAA access to all timekeeping records, allowing DCAA to review results of its internal audits, and publication of the notice of the plea agreement and requesting for strict compliance by its employees in regard to all timekeeping practices.

United States v. UCO Electronics, Inc. d/b/a Automation Services, Criminal No. 84-CR-60, N.D. New York—On April 30, 1984, the corporation pleaded guilty to charges of mail fraud and interstate transportation of money obtained by fraud.

a) The scheme involved the mischarging of labor hours to a time and materials (TM) contract. According to the government's Offer of Proof filed in support of the information, Automation Services, Inc. (ASI) engaged in a fraudulent scheme to mischarge employee time to IBM under a time and materials subcontract. For more than a year—late 1979 to early 1981—ASI management level personnel directed the systematic destruction, alteration, erasure and

fabrication of employee time cards, resulting in billing to IBM of thousands of hours of labor expended on other contracts. The contracts selected for mischarging by ASI were ones that were losing money. ASI's fraudulently inflated billings to IBM were passed on to Boeing, and in turn to the United States.

b) The corporation pleaded guilty to one felony count of mail fraud and one felony count of interstate transportation of money obtained by fraud, paid criminal fines totalling $11,000, and agreed to pay $180,000 under the terms of the civil settlement.

c) The plea agreement provided no further criminal charges would be initiated against ASI related to the subject matter or plea agreement, with the exception of any offenses in connection with the enforcement of federal revenue laws and any legal remedies available to the United States against any ASI employees or agents.

United States v. George S. Pan, et al., Criminal No. 83-2425, D. Massachusetts—On May 23, 1984, following a six-week bench trial, George S. Pan, Karen Y. Pan and Systems Architects, Inc., were convicted of violations of mail fraud, false statements and a false claim in connection with labor mischarging on government contracts.

a) The scheme involved shifting of direct labor costs to indirect expense accounts on cost-plus, fixed-fee government contracts. Time sheets were altered and labor distribution journal entries were made from not only the altered time sheets but also from altered summary sheets known as Contract Project Time Distribution sheets rather than from time sheets that were not changed. The government's evidence at trial established that Systems Architects, Inc., through the direction of George and Karen Pan, shifted more than $500,000 in direct labor costs into its indirect accounts. These false entries in their accounting records resulted in inflating the amount of indirect costs which the government reimbursed Systems Architects, Inc., on cost-plus, fixed-fee contracts. The government's evidence also established that more than $400,000 was overbilled to the government as a result of the labor mischarging and non-criminal accounting adjustments.

b) Systems Architects, Inc., was convicted on eleven counts, George Pan on ten counts and Karen Pan on two counts of mail fraud, false statements and a false claim.

c) After the indictment was returned, Systems Architects, Inc., George Pan and Karen Pan were suspended by the Air Force from participating in future government contracts.

VIII. Conclusion

From the above review several conclusions are obvious. Cost principles and their progeny are complicated and raise numerous opportunities for disputes with the government.

The criminal statutes are wide ranging and flexible and expose the government contractor to serious accusations of criminal conduct. The recently enhanced fine provisions raise the stakes even more. The contract auditor is a key player in the enhanced federal enforcement efforts and the contractor can expect substantial reliance will be placed on the views and opinions of the contract auditor. The government's civil and administrative tools are also formidable.

The implications even in light of the relatively few criminal prosecutions dictate that the public contractor work closely with the auditor and the contracting officer, take and maintain a position of full cooperation in the auditors' fact-finding efforts avoiding at all costs any charge of cover-up and generally reach an agreement on all disputes before they reach the stage of criminal referral. Only leave those disputes open which the contractor is prepared to fully litigate in administrative, civil and criminal arenas. This shotgun marriage of the contractor and the auditor actually will contribute to a more efficient and productive procurement system with incentives rather than disincentives to agree on matters after full disclosure of the facts. Litigation should be a last resort not simply a particular aspect of an overall business strategy in dealing with the government.

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Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing interests

James J. Graham*

I. Introduction

The government's response to allegations of fraud in its contracting activities has been under close scrutiny since at least 1977. The furor over allegations of fraud and corruption at GSA triggered support for the Inspector General Act of 1978.[1] That legislation required a study of the Department of Defense (DoD) enforcement efforts and later amendment of the act to include DoD in the act in 1982.[2] This

*Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice. The views and conclusions expressed by the author do not necessarily reflect the views of the Department of Justice or any other governmental organization.

1. 5 U.S.C. App. I.

2. *Id.* § 2. The results of the study were reflected in a multivolume report, REPORT TO THE CONGRESS ON THE DEPARTMENT OF DEFENSE AUDIT, INSPECTION AND INVESTIGATIVE ORGANIZATION, PURSUANT TO PUBLIC LAW 95–452, May 30, 1979.

attention to white-collar crime also has focused attention on the administrative response of federal agencies. In government contracting, the suspension and debarment remedies are the principal subject of this attention. In response to congressional hearings and a critical congressional report, the Office of Federal Procurement Policy instituted several radical changes to the exercise of administrative debarment and suspension, two very powerful but heretofore inconsistently employed administrative tools.[3]

These administrative and legislative developments have intensified the interest in and the importance of the steps taken by the government in response to allegations of fraud in contracting activity. Law enforcement is increasingly initiating investigations into areas of complex procurement activities.[4] This may entail investigations which require years to complete. At the same time the Congress and the public are urging the government to refuse to do business with fraudulent contractors.

Substantial procedural and practical requirements of both processes place the government's interest in criminal investigations and its procurement interest on a potential collision course. Sensitive examination of ways to accommodate not only the interest of law enforcement and the contracting officer and his client, but also the interest and concerns of the contractor are required. The impact of an ongoing investigation and simultaneous suspension of a contractor can be of devastating effect, essentially foreclosing defenses and tactics in response to an investigation available to others. This paper will examine the way the present practices, regulations, procedures and judicial opinions attempt to fairly accommodate the various interests in the context of an allegation of fraud and the use of suspension during the pendency of the criminal investigation. Also, an ABA proposal to radically revamp the entire suspension and debarment process deserves to be examined in light of experiences and its goals.[5]

3. Office of Federal Procurement Policy, Policy Letter No. 82–1, June 24, 1982. The policy letter has served as policy guidance to federal departments and agencies in fulfillment of their regulatory authority. The Defense Acquisition Regulations (DAR), the Federal Procurement Regulations (FPR) and now the Federal Acquisition Regulations (FAR) have with minor changes implemented the policy letter. Two of the more controversial provisions are the application of a debarment or suspension by one agency to all federal departments and agencies and the limited hearing rights provided by the letter and the conforming regulations.

4. Attorney General Benjamin R. Civiletti in August 1980 identified white-collar crime as one of four priority programs for the Department of Justice and specified procurement fraud involving more than $10,000 as matters receiving the highest priority. Attorney General William French Smith designated white-collar crime and particularly fraud against the government as one of five enforcement priorities for the Department.

5. This paper will only address the special issues surrounding suspension in the context of an ongoing investigation for fraud. Several commentators have ably reviewed the history and analyzed the major cases in the area of debarment and suspension, generally. Most recently, *see* Comment: *Graylisting of Federal Contractors: Transco Security Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 CATHOLIC U.L. REV. 731 (1981); Steadman, *Banned in*

II. Public Interest Principles

There are several public interest principles that come into play in any discussion of investigative and administrative responses to fraud in procurement. However, it may be useful to first define the term "fraud." Fraud has been defined in various ways but generally includes deceit, deception, concealment, breach of trust, acts of dishonesty and the like.[6] The federal criminal statutes are broad, encompassing a wide variety of types of conduct.[7] The Supreme Court stated:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention.[8]

The trend to an immediate government response to allegations of fraud—criminal investigation and suspension—is fueled by some common goals and purposes. A primary purpose is to insure that federal procurement dollars are well spent, that the government receives the best possible product for the lowest possible price to achieve these goals, and that the bidders are responsible.[9] This concept of responsibility in government procurement has always included the factor of integrity, the subject of both the suspension action and any investigation when fraud is alleged.[10] The power to deal with irresponsible and dishonest contractors is "inherent and necessarily incidental to the effective

Boston and Birmingham and Boise . . . Due Process in the Debarment and Suspension of Government Contractors, 27 HASTINGS L.J. 793 (1976); Calamari, *The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 NEW ENGLAND L. REV. 1137 (1982).

6. *See* REPORT, *supra* note 2.

7. Federal criminal statutes cover false statements and concealments (18 U.S.C. § 1001), false claims (18 U.S.C. § 286), schemes to defraud (18 U.S.C. §§ 1341 and 1343), conspiracies to defraud (18 U.S.C. § 371). Neither an actual loss or reliance by the government is required, and false statements reflected in a contractor's books and records but never directly submitted to government are also covered. E.g., United States v. Hooper, 596 F.2d 219, 233 (7th Cir. 1979).

Other criminal statutes also can be used to prosecute procurement fraud. 18 U.S.C. § 2314 (ITSP), 18 U.S.C. § 1962 (RICO), 15 U.S.C. § 78 ff(a) (FCPA record-keeping provisions).

8. Hammerschmidt v. United States, 265 U.S. 182 (1924)

9. 10 U.S.C. §§ 2301–14 provides contracts be given to the lowest bidder.

10. Agencies lack the authority to suspend or debar for punishment purposes. Roemer v. Hoffmann, 419 F. Supp. 130 (D.D.C. 1976). *See* oft-cited district court has always included honest and ethics case, O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934). A congressional subcommittee spent several days of hearings and published a lengthy report which described a strong governmental interest to effectively protect the disbursement of tax dollars by doing business with honest, responsible public contractors. Staff of Subcommittee of Oversight of Government Management, Senate Committee on Governmental Affairs, 97th Cong. 1st Sess.

administration" of federal programs including procurements.[11]

What are the interests of the bidder in this context? Although there is no right to bid on government contracts, neither can the government act "arbitrarily, either substantively or procedurally."[12] This principle is reflected not only in the Administrative Procedures Act but also in the Fifth Amendment: "No persons should . . . be deprived of life, liberty or property, without due process of law."[13]

These interests have to be applied to several basic principles underlying the criminal process, which itself needs to be understood. Generally speaking, the public and the governmental interest in detecting and prosecuting criminality outweighs other administrative and civil concerns of the government.[14] Wide discretion is given to prosecutors in initiating and conducting investigations and prosecutions,[15] and the grand juries' traditional independence and powers are even greater.[16] Coupled with a variety of powers to compel documents and testimony is a general investigative practice of keeping investigations, their subjects and their results secret.[17] In fact, Rule 6, Fed. R. Crim. P., strictly limits the use of information developed by a federal grand jury to prosecutors, investigators and others in connection with

REPORT ON REFORM OF GOVERNMENT-WIDE DEBARMENT AND SUSPENSION PROCEDURES, (Comm. Print 1981).

The concept of responsibility is critical to the exercise of the debarment and suspension remedy. The OFPP policy letter makes clear the argument that the underpinning to debarment and suspension are contractor actions which "seriously and directly affects the present responsibility of a Government contractor or subcontractor." § 7.2(a)(4).

11. Gonzalez v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964).

12. *Id.* at 574.

13. Const. Amend. V; Administrative Procedure Act, 5 U.S.C. § 554.

14. *See* Memorandum to the Heads of all Departments and Agencies in the Executive Branch of the Government, Attorney General William P. Rogers, January 27, 1956.

15. Principles of Federal Prosecution, U.S. Department of Justice, July 1980, p. 1. Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. *See*, e.g., Oyler v. Boles, Warden, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Dir. 1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966). This discretion exists by virtue of his status as a member of the executive branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed." U.S. Const. art. II, § 3. *See* Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Dir. 1974).

16. The grand jury "must be free to pursue its investigations unhindered by external influences or supervision so long as it does not touch upon the opinion and legitimate rights of any witness called before it." United States v. Dionisio, 410 U.S. 1, 17–18 (1973).

17. This security concern is a major factor both legally and practically in coordinating federal investigations and federal procurements. The Department of Justice recently formed a special unit to handle major DoD frauds with a major emphasis on maximizing coordination and joint decision-making.

their responsibility to "enforce federal criminal law."[18] Although there was some dispute concerning the circumstances in which disclosure of grand jury material can be made for *non*criminal purposes, it is now generally agreed that permission of the court is required.[19] The interest in secrecy of investigative proceedings and grand jury proceedings in particular is obvious. In *Douglas Oil Company of California v. Petrol Stops*, the court reiterated the four distinct interests that are served in this policy:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.[20]

Against those laudable public goals and purposes are set the interests of the target contractor. The rights of the targets of an investigation are generally prescribed in the Constitution.[21] Certain privileges do apply to the providing of information. But, as we will see later, privileges with respect to records and information in the possession of a public contractor are limited. Further, the public contractor incurs substantial financial risk if he relies on the presumptions of innocence and, essentially, simply challenges the government to "prove it". For that reason, it is critical that the contractor understand the limited rights that are available in a suspension action and utilize discovery and due process opportunities available.

The investigative interests, the predominance of criminal investigations, the secrecy of the investigation and the length of time required for an investigation are thus set against the interests of the procurement sys-

18. Rule 6(e)(3)(B), FED. R. CRIM. P. provides:

> Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of persons to whom such disclosure has been made.

19. *See* United States v. Sells Engineering, Inc., ____ U.S. ____, 103 S.Ct. 3133 (1983); United States v. Baggot, ____ U.S. ____, 103 S.Ct. 1356 (1983). Courts are split on the question of whether documents by themselves which are the subject of a grand jury subpoena are covered by the secrecy provision. E.g., United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960).

20. 441 U.S. 211, 219 (1979).

21. Illegal searches proscribed by Const. Amend. IV. The right not to incriminate oneself covered by the Const. Amend. V.

tem in dealing only with responsible contractors, the due process requirements imposed by the Constitution and judicial opinions. The interplay of these competing interests raises important questions on both conceptual and practical levels.

III. Description of the Two Processes

To best understand their interplay, it is useful to describe both processes briefly:

A. The Criminal Process

Allegations of fraud in contracting arise in both the criminal and administrative system from a variety of sources—complaints from disgruntled employees or competitors, news media, congressional or GAO investigations and government compliance or audit reviews. Agencies have limited discretion upon securing allegations of fraud, regardless of their source. They are generally required to report allegations of fraud to the attorney general, "expeditiously."[22] The Inspector General Act of 1978 requires even the inspector general "to report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of federal criminal law."[23] This reporting obligation can be satisfied by communication with a prosecutor directly or to the FBI. If it is reported to the FBI, the guidelines require there be a reasonable indication of a federal criminal violation (not probable cause) and a notification to a prosecutor "as soon as practicable after commencement of the investigation."[24]

At the core of any complex procurement investigation normally is the prosecutor. The prosecutor is the only person authorized to commit the United States to prosecute or to investigate in the grand jury. The prosecutor conducts the grand jury investigation and is responsible for the negotiation of any settlement and the selection of possible charges and possible defendants for the grand jury's ultimate action. Broad discretion is left for the exercise of discretion in the performance of those functions. This discretion is expected to take into account factors

22. Attorney general has interpreted this requirement to include a report to the FBI, U.S. attorney or the criminal division. 5 U.S.C. App. I § 4d of the Inspector General Act added a new dimension requiring only that the agency "report" criminal matters, not refer matters, to the Department of Justice. In that connection, the FBI and most of the statutory inspectors general in conformity with the Department of Justice Policy Statement have signed Memoranda of Understanding allocating their respective investigation responsibilities. Fraud investigations remain a responsibility of the FBI, but the inspectors general (IG) have also assumed a significant role in this area. The Defense Department is still operating under a Memorandum of Understanding reached between the then Secretary of Defense and the attorney general in 1955.

23. Inspector General Act, 5 U.S.C. App. I § 4d.

24. Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations, March 1983. The guidelines do allow the conducting of a preliminary inquiry for ninety days before seeking a prospective determination.

beyond merely whether a technical federal criminal violation exists.[25] In declining to investigate or prosecute, a relevant factor is the availability of "an adequate noncriminal alternative to prosecution."[26]

The prosecutor, upon receipt of an allegation, can decline prosecution for a variety of reasons generally related to the state of the evidence. Or he may elect to authorize the continuance of the investigation. Investigations at this point can take several directions. The FBI or prosecutor can rely on the inspector general to conduct further investigation; the FBI and the inspector general can conduct joint investigations; or the FBI will investigate the matter alone.[27]

Investigative techniques vary widely and depend on the status and nature of the matter. Two basic information-gathering techniques are a review of documents and an interview of witnesses. Either can be achieved simply by requests to the contractor, his lawyer or his employees for documents and information. Or either can be pursued by the power of subpoena—which is available to the inspector general for documents[28]—or by the grand jury, which can compel testimony and documents.[29] A choice of methods is often controlled by the prosecutor's assessment of the reliability of the contractor in responding to a simple request rather than demanding a grand jury subpoena.[30]

The grand jury is an independent investigative body. It is founded on the principle that "the public has a right to every man's evidence." It is not restricted by the "technical procedural and evidentiary rules governing the conduct of criminal trials."[31] There is a presumption of regularity in the exercise of the grand jury's investigative function.[32]

25. Principles of Federal Prosecution, U.S. Department of Justice, July 1980.

26. *Id.* at 5–6 allows a prosecutor to decline in favor of an "adequate" noncriminal alternative to prosecution" even if "he believes that the person's conduct constitutes a federal offense and that admissible evidence will probably be sufficient to obtain and sustain a conviction."

It is generally accepted that suspension and debarment are not for purposes of punishment. However, generally speaking, any ongoing administrative action to deal with a related problem such as debarment is considered and evaluated by the prosecutor as an alternative to prosecution.

27. Since both the FBI and the IG have authority to investigate, the decision is usually made on the basis of available resources and expertise. In this regard, the IG's audit capabilities can be an important factor.

One limitation on using the IG for the criminal investigation could be the impact of the investigation on other parallel proceedings also being pursued by the IG. *See* later discussion on parallel proceedings.

28. Inspector General Act, § 6(a)(4).

29. Rule 6, FED. R. CRIM. P.

30. A contractor may prefer a grand jury subpoena with the attendant limitations on disclosure. However, a publicly held corporation may incur disclosure obligations pursuant to SEC regulations.

31. Branzburg v. Hayes, 408 U.S. 665, 668 (1972); United States v. Calandra, 414 U.S. 338, 343 (1974).

32. Subpoena cannot be unreasonable or oppressive, documents requested must be relevant to the investigation, documents must be described with reasonable particularity, and limited to a

As a practical matter, privileges available for corporate records of a contractor are nonexistent.[33] The inspector general subpoena is equally as broad in its purposes and scope.[34]

This investigatively required openness of contractor records is at times difficult for contractors and public contract law practitioners. They are accustomed to restricting an auditor's access to the four corners of a contractual audit clause and by the scope of the sometimes restrictive interpretations of the Armed Services Board of Contract Appeals.[35] As a practical matter, as one public contract law commentator predicted, there is "virtually nothing left which cannot be subpoenaed and examined by the federal government."[36] In unusual investigations, particularly where the alleged criminality is ongoing, federal investigation also can employ extraordinary processes such as search warrants and "ABSCAM"-type undercover investigations.[37]

The prosecutor is the only person on the investigative team who is allowed in the grand jury, where the prosecutor usually directs most of the questions, drafts the subpoena *duces tecum* and prepares and presents any indictments. In addition to fulfilling the investigative leadership role, the Department of Justice also expects the prosecutor to identify and at times pursue civil

reasonable period of time. Gurule v. United States, 437 F.2d 239 (10th Cir.), *cert. denied*, 403 U.S. 904 (1970).

33. There is no Fifth Amendment privilege for corporations and other similar business entities. Bellis v. United States, 417 U.S. 85 (1974); attorneys for a witness are not permitted to be present in the grand jury; and even the scope of the attorney-client privilege can be narrowly drawn. E.g., *see In re* Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

34. 5 U.S.C. § 6(a)4 provides:

> Inspector General in carrying out the provisions of this Act, is authorized . . . . to require by subpoena the production of all information documents, reports, answers, records, accounts, papers and other data and documentary evidence necessary in the performance of the functions assigned by the act . . .

There is increased pressure on inspectors general to use this power to compel production of documents, heretofore unavailable to federal agencies, both before and after reporting to Justice. Rule 6, Fed. R. Crim. P., secrecy limitations do not apply to records secured in this fashion and thus make multiple uses of the information possible.

35. *See*, e.g., 32 C.F.R. §§ 7–104.15, 7–104.41 and, 7–104.83; SCM Corporation v. United States, 645 F.2d 893 (Ct. Cl. 1981).

Inspector general can use subpoena power not just to subpoena records to detect or investigate fraud but also to support wide ranging responsibilities to deal with efficiency in operation of government programs, quite a broad concept. Courts have supported the use of substantive subpoena to satisfy the "official curiosity" of an agency. Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). The court will enforce the subpoena unless it is so unrelated to the matter properly under inquiry as to exceed investigating power. United States v. Morton Salt Co., 338 U.S. 632 (1950).

36. Herbert L. Fenster and Darryl J. Lee, *The Expanding Audit and Investigative Powers of the Federal Government*, 12 PUBLIC CONTRACT L. J. 193 (1982).

37. Rule 41, FED. R. CRIM. P. The FBI conducts undercover operations under a highly centralized closely supervised structure. Attorney General's Guidelines on FBI Undercover Operations, January 5, 1981.

remedies and substantially to represent the broad interests of the United States in coordinating the simultaneous pursuit of administrative remedies.[38] How the prosecutor fulfills these various roles effectively while maintaining the secrecy of the grand jury proceedings, respecting the independent function and responsibility of the contracting officer and the procuring agency, and most importantly, while representing the interest of the United States is a tightwire act only a few have walked to date. The recent Supreme Court opinions dealing with grand jury secrecy, *United States v. Sells*[39] and *United States v. Baggot*,[40] may make more difficult the multiple function of the prosecutor representing all the interests of the United States.[41]

B. The Suspension Process

Suspension is the process by which the government temporarily excludes a firm or person from contracting on a government-wide basis until a determination of whether grounds for debarment exist.[42] The cause for a suspension that would be relevant to this article is a suspension based on "adequate evidence" of a "commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain or in performing a public contract or subcontract . . . the commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property. . . ."[43] The effect of the suspension is immediate but procedural due process re-

38. *See* Principles of Federal Prosecution.

39. *Supra* note 19.

40. *Supra* note 19.

41. In the argument before the Supreme Court in United States v. Sells Engineering, Inc., *supra* note 19, the question of whether the same attorney could handle both the civil and criminal action and thereby initiate the secrecy issue was raised but not resolved.

42. 32 C.F.R. § 1–600, *et. seq*,; DAR 1–600; 41 C.F.R. § 1–1.600, *et seq*. The government-wide aspect was recommended by the Senate subcommittee and implemented by the OFPP policy letter. Until 1982, an agency could continue to contract with a firm which was subject to another federal agency's debarment-of-suspension action. As a result, a firm could be subject to investigation, indictment or conviction and suspended by one agency and presumably found to be not responsible and at the same time continue to receive contracts from another agency. The new policy allows an exception if an agency head or a designee states in writing the compelling reasons justifying continued business dealings between that agency and the contractor. Policy Letter 7.1(c). The impact on debarment and suspension of this new aspect is not clear. It may result actually in fewer administrative debarments and suspensions in the first place as agency officials appreciate the dramatic effects of this action. Another possibility is that despite a presumption for debarment and suspension of all divisions, the government will negotiate the terms of the action limiting it to certain persons or departments to minimize its destructive impact as well as protect the government's interest.

43. 32 C.F.R. § 1–605.1(i)(A) and (C); DAR 1–605.1(i)(A) and (C). In assessing the adequacy of the evidence the regulation provides:

> Suspension of a contractor, subcontractor, bidder, offeror is a drastic action which must be based upon adequate evidence rather than mere accusation. In assessing adequate evidence, consideration should be given to how much credible information is available, its reasonableness in view of surrounding circumstances, corroboration or lack thereof as to important

quirements dictated by several judicial opinions require "immediate" notice to the contractor of the reasons for the suspension with a description of the irregularities in general terms without disclosing the government's evidence.[44] Notice is also given of the right to a hearing. In pending investigations, which are the subject of this article, the regulations and judicial decisions recognize a need to limit the scope of the hearing. The agency, after consulting with the Department of Justice and seeking its views, may decide "that to hold a hearing would obviously affect possible civil or criminal prosecution against a firm or individual . . . ." It is required to notify the suspended party within twenty days "that substantial interests of the Government impending a contemplated legal proceeding based on the same facts as the suspension would be prejudiced if a hearing were held."[45] However, the regulations also provide "that any information or argument in opposition to the suspension may be presented in person, in writing or through representation."[46] The period of suspension is generally limited to the period pending completion of the investigation, but in any event no longer than eighteen months.[47] The responsibility for initiating the suspension, conducting the hearing and deciding to suspend varies from agency to agency. In DoD the regulations merely provide the responsibility to the authorized representative of the secretaries of the various DoD departments; in the General Services Administration (GSA) a specific official is identified to make the initial determination and the board of contract appeals (BCA) is responsible for the hearing and the decision.[48]

IV. Issues of Constitutional Due Process and Grand Jury Secrecy

As the government enhances its effectiveness in employing its investigative and prosecutive responses

allegations, and inferences which may be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Government and not for punishment. Suspension is an administrative determination which may be modified when determined to be in the interest of the Government.

The most wide-ranging case on the application of the due process principle to the government's investigative needs, Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972), *reversing* 342 F. Supp. 703 (D.D.C. 1972) analogized adequate evidence to the probable-cause standard.

44. 32 C.F.R. § 1–605.3; DAR 1–605.3. Transco Security Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), *cert. denied*, 102 S.Ct. 101 (1981); Gonzalez v. Freeman, *supra* note 11.

45. 32 C.F.R. § 1–605.2; DAR 1–605.2.

46. *Id.*

47. 32 C.F.R. § 1–605.2; DAR 1–605.2; period of suspension is limited to twelve months unless an assistant attorney general in writing requests an extension.

48. The Navy and Air Force have administratively created suspension and debarment boards.

together with the suspension and debarment remedies, greater pressure is placed on certain issues of constitutional due process. These have dimensions that already have been subject to limited judicial and regulatory attention. The necessary interplay between the investigation and suspension processes and the sorting out of the competing but usually consistent governmental interests involves two types of due process questions: Can the government protect its interests in the secrecy and integrity of its investigations and still provide sufficient due process in connection with its exercise of the suspension responsibilities? Can the government pursue parallel remedies and not violate Rule 6, Fed. R. Crim. P., or the basic due process of the target? Examination of the suspension procedures, the cases which in fact forced the government to provide any due process with exercise of its suspension function, and the decisions which recently clarified issues in parallel proceedings provide guidance to effective utilization of both remedies. They also provide affirmative answers to both of these important questions.

A. Administrative Procedures

As a practical matter, due process as we know it, in the exercise of an agency's suspension function, was not available until 1964 when the U.S. Court of Appeals for the District of Columbia held that: "Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made."[49] It was not until 1972 when the government exercised its suspension authority in the context of an ongoing investigation that the balancing of the interests of the prosecutor, contractor and procuring agency first arose. In *Horne Brothers, Inc. v. Laird* (hereinafter *Horne Brothers*), the Navy had "substantial reason to believe" that the contractor had given gratuities to Navy personnel and suspended Horne Brothers from further bidding.[50] The regulations in effect at the time did not provide the contractor "an opportunity to confront his accusers and to rebut the 'adequate evidence' against him." The court concluded that there was no difference between debarment and suspension to a contractor "whose economic life may depend on his ability to bid on government contracts" and held the government responsible to insure fundamental fairness to the contractor.[51] The court held that this fairness requires that "the bidder be

49. Gonzalez v. Freeman, *supra* note 11 at 578.
50. District Court decision in Horne Brothers, Inc. v. Laird, *supra* note 43, at 705.
51. Horne Brothers, Inc. v. Laird, *supra* note 43, at 1271.

given specific notice as to at least some charges against him and be given, in the usual case, an opportunity to rebut those charges."[52] The court specifically stated that this did not require a hearing before the suspension was effective. Where there was "the concern that such a proceeding may prejudice a prosecutorial action" a hearing was not required at all. In that instance the court found sufficient a finding of adequate evidence to support a suspension and a formal determination of "an official with discretion" that "significant injury would result if a hearing were to be held." The contractor could challenge that process through a judicial examination *in camera* of the evidence held by the government.[53] Although the court did not deal with the allowable period in which a suspension can continue without a hearing or whether a limited hearing without the right to cross-examine the government's witnesses and review the evidence would be sufficient, *Horne Brothers* did specifically state:

> Our remarks should not be taken to mean that in every suspension action the Government must offer the contractor a proceeding within one month of his suspension. There may be reasons why the Government should not be required to show any of its evidence to the contractor, particularly reasons of national security, or, more likely, the concern that such a proceeding may prejudice a prosecutorial action against the contractor. The Government may also be concerned that a suspended contractor may seek a proceeding not so much to obtain reinstatement as a bidder, but in order to obtain a discovery not generally provided to criminal defendants.[54]

In light of *Horne Brothers* the regulations were modified to essentially their present form: They allow for a hearing in the usual case. If, for investigation reasons, a hearing cannot be held, the contractor can be given the opportunity to present and the agency required to consider "information or argument in opposition to the suspension . . . in person, in writing or through representation."[55] It was not until 1980 that another court had the opportunity to consider the implications of suspension in the course of an ongoing criminal investigation and the regulatory changes in light of *Horne Brothers*.[56] The Sixth Circuit in *Transco Security, Inc. of Ohio v. Freeman* (hereinafter *Transco*), focused on the adequacy of the regulations for a hearing and the scope of the notice provided the contractor in the instant suspension.[57] In balancing the government's interests as a proprietor to purchase services and its interest in protecting the "integrity of a possible criminal prosecu-

52. *Id.*
53. *Id.* at 1272.
54. *Id.*
55. 32 C.F.R. § 1–605.2(a)(2); DAR 1–605.2(a)(2).
56. The infrequent use of the debarment and suspension remedy was a major source of criticism in the Senate REPORT, *supra* note 10.
57. 639 F.2d 318 (6th Cir.), *cert. denied*, 102 S. Ct. 101 (1981)

tion" against the contractor's interest not to be denied the right to bid on contracts, the court found that the regulations effectively "accommodate these conflicting interests by requiring the decision of a top-level administrator in accordance with specifically articulated standards before the suspension may be issued and permitting the suspended bidder to submit information and argument in opposition to suspension."[58]

The Sixth Circuit noted that under most circumstances this opportunity to present evidence, coupled with proper notice, eliminated any significant risk of suspension of the wrong contractor or the risk of a suspension that is based on mere suspicion or unfounded allegations.[59] In the instant case, the general notice that had been provided the contractor about "billing irregularities, caliber of performance of its employees and eligibility of the contractor" was found to be deficient:

> We believe that as in Horne Brothers and Old Dominion, due process in this case required notice sufficiently specific to enable appellants to marshal evidence in their behalf so as to make the subsequent opportunity for an administrative hearing a meaningful one. We recognize the government's right to protect the secrecy of its ongoing criminal investigation by not disclosing its evidence at this stage of the proceedings. We find, however, that in this case the interests of appellants in more specific notice and of the government in maintaining the integrity of its investigation, are not mutually exclusive. Advising appellants of which bills were irregular and how the caliber of its employees were misrepresented need not involve the disclosure of the government's evidence. The government need not at this point inform appellants of any information it has. It need not reveal, for example, the identity of potential witnesses or the existence of documents unknown to appellants. It can state the charges with more particularity without identifying the source of the government's information. While there may be instances where specificity cannot be accomplished without disclosure this was not such an occasion.[60]

The court also discussed use of an *in camera* submission to evaluate the adequacy of the notice.[61] For those looking for further guidance on notice outside of the context of administrative law, the notice required in an indictment and a bill of particulars in the criminal process is as useful a guide as any other.[62]

The court went on to deal with the issue of the length of suspension and concluded that with a determination at a high level of adequate evidence, specific notice of the reasons for suspension and the opportunity to present information afforded, "the pos-

58. *Id.* at 322.

59. *Id.* at 322–23. Mullane Special Guardian v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

60. *Id.* at 324.

61. *Id.* at 325. Due process requires "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

62. Rule 7, FED. R. CRIM. P.; Wong Tai v. United States, 273 U.S. 77 (1927).

sibility of a lengthy suspension based on mere suspicion, unfounded allegation, and clear error no longer exists." It was not unreasonable that the government should have a period of twelve months (or eighteen months should the assistant attorney general request an additional six months) in which to prepare its case and to decide whether to indict. During that period the government's interest in not dealing with a contractor which it has probable cause to suspect wrongdoing outweighs the contractor's interest in being awarded and performing government contracts.[63]

Horne Brothers and *Transco* confronted *most* of the due process issues surrounding the accommodation of various interests connected with suspension during the course of an ongoing investigation—the scope of the notice, a determination on the record of adequate evidence to support the suspension, the limited rights to a hearing, and the reasonable length of the suspension. However, several important issues were left relatively untouched. These included the suitability of the official who authorizes the suspension and who also serves as the official reviewing the evidence and information submitted by the contractor.[64] However, even the issues that seemed to have been explored fully may be subject to further explanation.[65] For example, the Claims Court recently invalidated a suspension of an Air Force contractor because the notice of suspension, although it fully described the factual basis, did not set a certain date for the Air Force board "to hear the contractor's version of the facts."[66] Suspension law here has developed largely from a series of government

63. Transco Security, Inc. of Ohio v. Freeman, *supra* at 324. The court also dealt with the propriety of submitting evidence to support a suspension *in camera* and concluded *in camera* process is not ordinarily used to make a determination but rather to sort out which documents must be disclosed. The court does note that where the government asserts it cannot provide more specific notice, the court may review the evidence *in camera* to determine if "the contractor has been given as specific notice as is possible under the circumstances." *Id.* at 325.

64. There are other issues remaining that do not apply directly to the limited scope of this paper, e.g., adequacy of the published standard, suspension or debarment based on a plea of nolo contendere, etc.

65. Dramatic changes should not occur inasmuch as the Supreme Court has generally accepted the principle that due process does not require full trial rights in the agency context. In Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976), the Court said:

> Due Process is flexible and calls for such procedural protections as the particular situation demands . . . requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

66. Electro-Methods, Inc. v. United States, Cl. Ct. No. 582–83c; 40 BNA Federal Contracts Report 559, October 10, 1983. The Court's problem was a suspension taking effect immediately with six weeks intervening without any notice from the Air Force as to when the contractor would have an opportunity to present "its version of the truth".

*mis*steps. Unfortunately, these may continue to control the development of the law.[67] Also, the added factor of government-wide suspension may cause a court to look more closely at the procedures, although nothing in *Horne Brothers, Transco* or others indicates that the courts were viewing suspension as anything less than virtually the death penalty for a contractor who is heavily dependent on government contracts.[68]

B. Parallel Criminal/Administrative Proceedings

The second due process question that is raised directly by the intertwining of the criminal and suspension processes arises not in the procedural requirements of administrative law but in a most basic question—is it *fair* for the government to proceed on several fronts at the same time against a contractor? And, what safeguards are available to a contractor who is faced with this prospect?

The Supreme Court, in *United States v. Kordel*, established that there is no bar, *per se*, to the simultaneous pursuit of civil, criminal and administrative remedies—"parallel" proceedings.[69] However, objections can arise if the government does not pursue each remedy carefully. It may become exposed to the allegation that the government is using the administrative process to aid its criminal investigation or the converse: that the criminal investigation or grand jury is being used to aid the government's civil or administrative goals.[70]

67. *See*, e.g., Peter Kiewit Sons' Co. v. U.S. Army Corps. of Engineers, 534 F. Supp. 1139 (D.D.C. 1982) *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983); Art-Metal-USA, Inc. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978), both examples of government zeal in response to alleged problems with a contractor and an inattention to the procedures prescribed by the regulations.

68. *See* Horne Brothers, Inc. v. Laird, *supra* note 43; Transco Security, Inc. of Ohio v. Freeman, *supra* note 44. However, the D.C. Circuit, which has been actively involved in the development of the law in this area, sent a clear signal in Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, *supra* note 67, that despite some apparent inadequacies in the suspension process in that case, the court should leave such matters to administrative resolution disapproving of judicial intervention.

69. 397 U.S. 1 (1970).

70. Ordinarily, when faced with a parallel civil and criminal action with the government, the subject of the investigation will seek to stay the civil proceeding. In a parallel suspension—criminal investigation, the government's interests are to sustain the suspension and the target firm's interest is to continue to bid on government contracts, making a stay unsatisfactory from either party's point of view.

The Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *See* Baxter v. Palmigiano, 425 U.S. 308 (1976); DeVita v. Sills, 422 F.2d 1172, 1181 (3d Cir. 1970). Nevertheless, a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem to require such action, sometimes at the request of the prosecution, * * * sometimes at the request of defense[.]" United States v. Kordel, *supra*, 397 U.S. 1 (1969) at 12 n.27; *see* Horne Brothers, Inc. v. Laird, *supra* note 43 at 1271–1272 (D.C. Cir. 1972). The court must make such determinations in the light of the particular circumstances of the case.

Once an indictment is returned, the granting of a stay is more likely. United States v. Armada Petroleum Corp., 700 F.2d 706 (D.C. Cir. 1983).

This first objection arises most frequently in issues of IRS summonses. In *Donaldson v. United States*, the Supreme Court stated:

> The use of a summons also has been approved even where it is alleged that its purpose is to uncover crimes, if no criminal prosecution as yet has been instituted. On the other hand, where the sole objective of the investigation is to obtain evidence for use in criminal prosecution, the *purpose is not a legitimate one* and enforcement may be denied. This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of the issuance of the summons.[71]

The test prescribed by the courts is one of good faith, i.e., to determine if the civil/administrative proceeding was brought in good faith. The Supreme Court in *United States v. LaSalle National Bank*, reaffirmed the good-faith standard.[72] The majority held that the IRS summons power did not include its use to satisfy *solely* criminal purposes and remanded to the district court to make an inquiry as to whether the government's case in employing the summons power was a good-faith fulfillment of its civil tax obligations. The mere fact that such proceeding had attendant benefits to an ultimate criminal investigation or prosecution would not be a bar.[73]

The cases tell us that the good-faith test has a second part: has the government complied with its notice responsibilities, and has it avoided any affirmative misrepresentation about its attendant purposes? That is, did the government accurately advise the contractor of the good-faith purpose of its inquiry? And, if a criminal investigation was pending, did it advise the contractor of that fact? This is an important area for inspectors general. They wear a variety of "hats" at different times—investigator, auditor, management analyst, contracting officer, fact-finder, efficiency and economy expert.[74] Several cases that are cited as bars to parallel proceedings actually are founded in examples of a failure to give notice of the purpose of the subpoena or examples of the government's affirmative misrepresentation about the nature of the inquiry.[75]

The burden of showing improper use of the investigation is on the defendants.[76] Opportunities to make such a showing often occur at

71. 400 U.S. 517, 532–33 (1971).

72. 437 U.S. 298 (1978).

73. United States v. LaSalle National Bank, 437 U.S. 298 (1978).

74. 5 U.S.C. App. §§ 2 and 4 *describes* the objectives, duties and responsibilities of the inspector general as covering economy, efficiency, and effectiveness in the administration of and to prevent and detect fraud and abuse in, federal programs.

75. *See*, e.g., United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965) (failure in SEC proceedings to advise of prosecution recommendation); United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir. 1970) (affirmative misrepresentation of existence of criminal inquiry); *see also* United States v. Sclafani, 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959) (no duty to warn of criminal); United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); United States v. Tonahill, 430 F.2d 1042 (5th CIr. 1970) (but affirmative misrepresentations prohibited); United States v. Rand, 308 F. Supp. 1231 (N.D. Ohio 1970).

76. United States v. Fisher, 500 F.2d 683 (3rd Cir. 1974).

the "referral" stage, when the government's coordination of an investigation is in transition from the agency to the prosecutor or investigator who is largely unaware of the administrative status of the matter. The District of Columbia Circuit applied these parallel proceedings principles in a simultaneous Securities and Exchange Commission (SEC) and Department of Justice proceeding.[77] In that case the SEC was seeking enforcement of a subpoena for records including "questionable foreign payments" at the same time the Department of Justice was conducting a criminal investigation of the payments. The court restated the *Kordel* and *LaSalle* rationale validating parallel proceedings consistent with the good-faith test of the processes and the appropriate limitations on cooperation between agencies imposed by Rule 6. The court, in a three-judge panel, was concerned by the joint pursuit of parallel remedies and the difficulty of evaluating the good faith of the government processes. It required that once the Justice Department initiates a criminal proceeding by means of a grand jury the SEC may not provide the Justice Department with the fruits of the SEC's discovery gathered after the decision to investigate. The court, *en banc*, rejected this restriction. It found that it served "no compelling purpose and might interfere with enforcement of the Securities laws of the SEC and Justice."[78]

C. Grand Jury Secrecy

The converse of the IRS summons situation is where it is alleged the grand jury is being used in aid of a civil or administrative purpose, such as to facilitate a suspension.[79] The test is the same as in the converse situation but it is complicated by the relative inflexibility of Rule 6(e), Fed. R. Crim. P. It is clear the grand jury exists and that it can satisfy only one purpose—"to enforce Federal criminal law." The interests of secrecy control.[80]

The general rule is that information developed in the course of a grand jury may not be made available for use in administrative or civil proceedings absent a court order. Courts generally are reluctant to permit such disclosures.[81] The Supreme Court, in denying disclosure to one private party, has held that the party seeking disclosure bears the burden of demonstrating that

77. Securities and Exchange Commission v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980).

78. *Id.* at 1387.

79. *See* United States v. Proctor and Gamble Co., 356 U.S. 677, 683 (1958).

80. United States v. Calandra, *supra* note 31; United States v. Baggot, *supra* note 19.

81. United States v. Sells Engineering, Inc., *supra* note 19. However, if the evidence is records or data, itself subject to review and access of the administrative process, with the permission of the court under Rule 6(e), access can be attained. *See e.g., In re* Blue Ribbon Frozen Food Corp., 414 F. Supp. 399 (D. Conn. 1976).

the public interest in disclosure outweighs the interest in secrecy.[82] The phrase in Rule 6, "preliminary to judicial proceedings," has been read in varying degrees of narrowness by various courts.[83]

This secrecy restriction raises serious information-exchange limitations for federal agencies once a grand jury investigation begins.[84] Consistent with parallel proceedings principles, prior to this point there was no limitation on exchange of information and in fact the Justice Department *urged* prosecutors and investigators to make available to agencies investigative information gathered during the course of an investigation. That was thought to assist them in aggressively pursuing their own processes to protect the interests of the United States.[85] Rule 6, Fed. R. Crim. P., prohibits the disclosure of "matters occurring before the grand jury" absent a court order. The Supreme Court recently reaffirmed the substantial limitations imposed by the secrecy requirements on parallel proceedings. In *United States v. Sells Engineering, Inc.*[86] the Court held that in order for attorneys of the Civil Division of the Department of Justice to obtain access to grand jury materials for the purpose of preparing and pursuing a civil suit there must be a court-ordered disclosure under Rule 6(e)(3)(C)(i) based upon a showing of particularized need. In *United States v. Baggot,*[87] the Court held that an Internal Revenue Service audit to determine civil income tax liability is not "preliminarily to or in connection with a judicial proceeding." Thus, disclosure of grand jury material under Rule 6 (e)(3)(C)(i) was unavailable. The question of whether subpoenaed documents are covered by the secrecy provisions remains an open one. It has been successfully

82. Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211 at 221 (1979).

83. *See* United States v. Sells Engineering, Inc. and United States v. Baggot, *supra* note 19. *See also* Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (bar grievance); *In re* Special February, 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); In the Matter of Grand Jury Proceedings, Miller Brewing Company, 687 F.2d 1079 (7th Cir. 1982).

84. Restrictions do not apply to the results of interviews or review of documents not secured by the use of grand jury process.

85. *Hearings Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 97th Cong., 1st Sess., March 11 and 12, 1981, pp. 446–50, the Chief, Fraud Section, Criminal Division, Department of Justice, complained that "agencies are not aggressive in pursuing the suspension and debarment remedy at any stage of the process." In that testimony, later adopted as division policy, the Department of Justice urged agencies and prosecutors to share information and coordinate their efforts to pursue remedies simultaneously and expressed the view that a preferred course is segregation of evidence and narrowly constructed suspension actions with full hearing procedures.

86. _____ U.S. _____, 103 S. Ct. 3133 (1983). The Department of Justice argued that civil division attorneys should be considered "an attorney for the government" for purposes of working disclosure without a court order. The court held that such disclosure "is limited to use by those attorneys who conduct criminal matters to which the materials pertain." The court specifically refused to address the propriety of use of grand jury material in the civil phase of a case "who himself conducted the criminal prosecution" footnote 16.

87. _____ U.S. _____ 103 S. Ct. 3133 (1983).

argued that preexisting business documents are *not* subject to the secrecy obligations of Rule 6(e) when they are sought by the proper authorities for legitimate reasons and not for the purpose of discovering what occurred before the grand jury.[88] However, *Baggot* seems to clearly preclude consideration of a debarment or suspension as preliminary to judicial proceeding. The action is purely administrative and resort to the judicial review is not in the hands of the government but the contractor: "Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to judicial proceedings" for purposes of Rule 6.[89]

The inspector general's subpoena power can serve as a loophole to this secrecy limitation in two ways. First, if the investigation depends principally on acquiring documents, the prosecutor can elect to use the inspector general's subpoena to gather the records. If the grand jury has already subpoenaed the records the agency can use the subpoena power as a basis for a Rule 6 motion and a court order.[90] Whether the broad purposes of an inspector general's subpoena would encompass gathering evidence to support a suspension or debarment is unanswered. If not, this would raise the basic parallel proceeding question discussed earlier.[91]

V. How Do the Two Processes Interplay?—A Hypothetical

It may be useful in describing the actual interplay between the agency and the prosecutor/investigator to take a hypothetical case and describe the various steps through the system.

ABC Meat and Computer Parts, Inc. (ABC) has been supplying the Defense Department with meat and computer components for the past ten years. Their total annual sales are about $40 million; 85 percent of that business is with the United States. A former employee, allegedly fired for tardiness, reports to a DoD hotline that the corporation is supplying an inferior product than represented (round steak vs. sirloin, steel-based backing vs. silver-based backing) and has compromised government inspectors with bribes and gratuities. The inspector general causes some spot-testing to be accomplished on a confidential basis. This appears to confirm the allegation.

88. *See* United States v. Interstate Dress Carriers, Inc., *supra* note 19; *See also* United States v. Standford, *supra* note 19 at 291.

89. United States v. Baggot, *supra* note 19 at 6.

90. *In re* Blue Ribbon Frozen Food, *supra* note 81; *In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977); *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974).

91. Although the inspector general subpoena power is broad, it is not without its limits. Whether it can be used solely to support a suspension is doubtful, but the inspector general may be able to justify it if other agency purposes are involved. United States v. LaSalle National Bank, *supra* note 73.

The Criminal Investigation: At this point, the inspector general refers the matter to the FBI and to a United States attorney. A formal investigation is initiated; all of ABC's records relating to those two contracting areas are subpoenaed; employees are interviewed; and sufficient samples of the meat and computer parts are selected and tested. The investigation lasts over two years and involves over fifty interviews, twenty days of grand jury investigation, a review and analysis of over seventy-five boxes of records which include computer tapes, immunizing over twenty employees of the contractor and government personnel. In our hypothetical, we will assume the investigation revealed the substitution of product occurred in 30 percent of the contracts and government inspectors were given gratuities of theater tickets, food and lunches. Uncorroborated testimony indicates that the chief inspector was bribed $200 a month for two years in 1979–80.

The Suspension Action: Now, what should the agency do in terms of suspension? Evidence of wrongdoing is available at the point the former employee complains. Corroboration is available through the spot tests. This evidence alone may be enough to support a finding by the agency of adequate evidence of the commission of fraud. Additional evidence is being developed on a daily basis which would further support the adequate evidence finding. The agency decides to suspend ABC. Although ABC is a substantial bidder in both areas of procurement it is not a critical contractor. Notice is given to ABC outlining the allegation of fraud by the contractor, excluding reference to the possible corruption. This omission is done to assist the investigation. The notice specifies the contracts in question and the allegation of substitution in both areas. The contractor seeks a hearing; the Justice Department, in writing, asks the agency to deny a hearing based on its possible impact on the investigation. The reasons for the prosecutor's request are that the hearing will disrupt the investigation by prematurely disclosing the direction of the investigation; it will subject the witnesses to cross-examination; and it will force the government to disclose its limited documentary evidence. All of these possibilities, in the experience of the prosecutor, increase the risk of fabrication of evidence and testimony. The government could take a middle position and further limit the basis of the suspension to evidence whose release would not affect the investigation. In that event it would not object to a full hearing.[92] The contractor is then given the opportunity to offer any evidence it has to rebut the charges reflected in the notice. ABC submits some of its own spot-testing indicating the product conforms. It submits to the govern-

92. *Hearings Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 97th Cong., 1st Sess., March 11 and 12, 1981.

ment its own quality-control tests indicating conformity and it argues that the substitutions are permitted under the specification, or at least not prohibited. It points to its impeccable contracting record and the reorganization of management to more closely watch quality control.

Since the procurement is administered by the Defense Logistics Agency (DLA), the General Counsel reviews the statement of the former employee, the spot-testing results and recently received statements which further corroborate their substitution practices, as well as ABC's submission and representation made in writing and in person. The agency issues a suspension order. Six months later the ABC suspension is extended pursuant to a Justice Department request. In that time period ABC sells its business to XYZ.

This hypothetical indicates the powerful tools that are available to both the investigatory and administrative processes and how both processes can work toward common objectives within the limitations of the case law and the regulations. What can the contractor do? If the government uses its tools effectively and fairly as described above, contractors can either forego future government business and put the government to the test or can join the government as a partner in self-examination of the procurement problem and the development of a solution.

VI. The ABA Recommendations

The Public Contract Law Section of the American Bar Association (ABA) recently published a Report and Recommendations on Debarment and Suspension. The report was prepared by a Committee on Debarment and Suspension consisting of twelve most distinguished practitioners, board members and legal professors. The report states a series of general principles on the subject of debarment and suspension and specific recommendations for reform. In January, 1982 the ABA's House of Delegates adopted thirty-six principles and "urged" Congress to enact legislation incorporating the thirty-six principles of a proposed Debarment and Suspension Act.

The basis of the recommendations for reform is a basic dissatisfaction with a number of areas of current debarment and suspension practice. This article is directed at the suspension procedure in ongoing investigations. In this area, the committee was in agreement that "present suspension procedures do not give the respondent the level of due process protections that the severity of this sanction requires." The specific areas of dissatisfaction include:

- the general flexibility of the federal regulatory scheme;
- the authority of the procurement agency to decide on the

adequacy of the evidence supporting a suspension;
- lengthy periods of suspension;
- insufficient notice of the reasons for suspension and discovery opportunities;
- limited opportunity to actually cross-examine witnesses and the other procedural trial rights;
- suspension prior to any hearing.

The ABA has recommended a major overhaul of the debarment and suspension process. The relevant recommendations include:

- creation of a single, independent board to separate the prosecutorial and judicial functions;
- no suspension without a hearing absent a showing by affidavit of an immediate and irreparable inquiry, loss or damage;
- suspension will only be preliminary to a debarment, which proceedings will be completed in six months;
- board will review *in camera* evidence from either the government or a private party if either represents that disclosure would prejudice their interests;
- suspension cannot remain in effect for a period of more than ninety days unless a debarment hearing has been commenced before the board or an indictment returned;
- board may stay a debarment proceeding and a related suspension pending the resolution of a criminal proceeding but in no case can a suspension remain in effect for more than ninety days unless an indictment is returned.

Many of the goals of the ABA are laudable. They are generally consistent with the goals of the modifications of the Office of Federal Procurement Policy (OFPP). Unfortunately, without specifically stating the position, the time limits imposed essentially eliminate suspension as a remedy during the course of an investigation.

The creation of the independent board essentially strips the procuring activity of an essential function for operation and confers that authority on a board which by other experiences promises delays, bureaucratic procedures and litigation into an essential contracting process. The standards and the discovery would require that the government be prepared to pursue its case completely even where the delays in evidence-gathering are due to the contractor. Rather than encourage cooperation with government investigations, the proposal provides incentives for stalling investigations. The various time limits are unrealistic. It is not the unusual case in which the contractor requires sixty days to respond to a subpoena *duces tecum*.

Finally, the ABA has proposed a massive restructuring of a significant part of the procurement process proposing an independent board, imposing various detailed

procedural rules and regulations, all designed to restructure a process that essentially conforms to the concerns of the courts.

VII. Conclusion—A Practical Assessment—Some Legal Avenues

The case law in the context of these parallel proceedings and the adequacy of the suspension procedures provide to the government a relatively free hand in using extremely powerful tools. Historically, those tools have always been available but perhaps not as effectively used. The new interest in suspension and debarment by government agencies has encouraged the Department of Justice to pursue parallel inquiries. This promises a new and added exposure for government contractors. Any careless employee of these governmental powers can cause serious injustice. For example, a criminal investigation which continues for extensive periods of time and results in no prosecution because the terms of the contract *permit* the conduct which was the subject of the investigation would cause serious injustice to a contractor, his employees and his stockholders. This is especially true if he was also suspended during the course of the investigation.

The potential for injustice is further magnified if the government takes a restrictive posture on discovery in connection with the suspension proceedings and refuses him an opportunity to cross-examine the accusers. The innocent contractor must deal with the advice normally provided the targets of the investigation by their lawyers—to decline to be interviewed, asserting the Fifth Amendment privilege. This difficult choice does not have such severe financial effects in the context of other criminal investigations. At present a contractor who is faced with the parallel remedies is under a great incentive to pursue an early settlement resolving all the matters under dispute. The ability of both the government and the contractor to efficiently accomplish this resolution may prove more difficult than it appears.[93] Such global settlements, although often in the interest of both parties, will push the prosecutor into negotiation on appropriate periods of debarment or, more frequently, eliminate debarment in favor of various prophylactic measures. Such undertakings can include employee dismissals and transfers, special internal and external audit or inspection steps, special reports and anticipation of various other corrective action by management. This will further serve to blur the at-times-thin line described in this article between the criminal and procurement processes.

Several legal arguments to solve this confrontation with the Fifth

93. United States v. Litton Systems, Inc., 573 F.2d 195 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978).

Amendment may develop. They may seek contractor immunity in connection with the suspension proceedings. The First Circuit recognized that although a corporation does not have a Fifth Amendment privilege, the act of production alone can have testimonial aspects in terms of judicial determination in a trial of the authenticity of the records and force the government to immunize the act of production.[94] The courts also have immunized any testimony provided under compulsion by an employee under threat of loss of employment.[95] The factual argument in the public-contractor contest is that the practical consequences of relying on the Fifth Amendment privilege is loss of economic life.

94. *In re* Grand Jury Proceedings United States, 626 F.2d 1051 (1st Cir. 1980).
95. Garrity v. New Jersey, 385 U.S. 493 (1967).

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Corporate Criminal Liability of the Public Contractor—Are Guidelines Needed?

by James J. Graham

The past five years marked a period of radical redesign in the way the federal government, particularly the Defense Department (DOD), relates to its contractors. There have been major law and structural changes. In just the enforcement-related areas, these changes include amendments to the Civil False Claims Act,[1] an inspector general with subpoena power,[2] the Defense Contract Audit Agency (DCAA) with an expanded self-concept of its enforcement obligations and the power to subpoena,[3] expanded requirements for indirect costs certification,[4] awakening of the suspension and debarment remedy,[5] and an increasing belief that defense contractors have a duty to investigate and report fraud.[6]

These reforms, each worth close analysis on its own, have been fueled almost entirely by the perception that the procurement process is racked with fraud and corruption which the government needs expanded powers and remedies to address.[7] Each of the changes has as its backdrop the application of federal criminal statutes to the corporation and its officers and employees. The law here remains relatively untouched. It is expansive in its scope, and its application remains almost entirely in the hands of good judgment by Department of Justice (DOJ) prosecutors. Many of the civil and administrative remedies are directly connected to determinations made by the criminal process.[8]

This article addresses the scope of the federal criminal laws as applied to the contractor/defendant as a corporation. In light of the alternative remedies and various reforms, does it not make sense that the government provide some guidelines on when it will utilize its most severe remedy—criminal prosecution?

It is well accepted that defense contractors have "some unique and compelling obligations to the people of the Armed Forces, the American taxpayer, and our nation."[9] The question is whether this unique relationship also obligates the DOD and DOJ to be clear in their standards and in exercising their judgments.

The DOD recently took its first steps in this direction by encouraging contractors to implement internal controls and indicating that administrative action will be less severe for those who respond. The DOJ is hesitant, however. To appreciate the need for prosecution guidelines, it is necessary to understand the scope of the criminal law's application to government contractors.

Scope of Corporate Liability

It has long been accepted that a corporation is as criminally liable as a person.[10] A corpora-

James J. Graham, Nova (VA) Chapter, NCMA, is counsel for the Washington, D.C., office of the law firm Jones, Day, Reavis & Pogue. He is former deputy chief, Operations, Fraud Section, Criminal Division, DOJ, and senior litigation counsel, Office of the United States Attorney, Eastern District of Virginia.

tion is criminally liable for the acts and statements of its agents accomplished to benefit the corporation and within the scope of their employment.[11]

Corporations have been found criminally liable for the acts of salesmen,[12] truck drivers,[13] laborers,[14] assistant traffic managers,[15] and clerical workers.[16] The courts do not look at employees' job descriptions but rather at their manner of conduct; i.e., whether an employee's conduct "may fairly be assumed to represent the corporation."[17]

The courts also are not disturbed by the fact that the employee may be acting in direct contravention of corporate policy or instruction.[18] Generally speaking, the best the corporate entity can expect is that the jury can consider (on the issue of criminal intent) whether the agent was acting for the benefit of the corporation.[19] A corporation's strongly worded ethics policies can worsen the corporate position if the corporation was "delinquent in enforcing them."[20]

If the agent appears to be in a position to bind the corporation, the next question is whether the employee was acting to benefit the corporation.[21] Proof of a purpose to benefit the corporation is satisfied—even if there is no actual benefit to a corporation—as long as the acts are in "furtherance of business interests."[22] If the scheme is to benefit the person and not the corporation, conviction of the corporation will not be sustained. Even when all the apparent agents are acquitted, however, a corporation can still be found liable.[23] Jury verdicts are not required to be consistent, and the courts, although uncomfortable, do not require a separate finding of specific agent liability.[24]

In the regulatory area, the requisite proof of knowledge of the corporation may not require knowledge in even a single employee but rather can be found in more than one source and then collectively imputed to the corporation.[25] The First Circuit in *United States v. Bank of New England*,[26] recently gave new vitality to this theory. The court said:

"A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. . . . Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation: [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." (Citations omitted.)

This theory of liability would suggest that in the Truth in Negotiations Act (and other areas where a certificate is called for), the corporation is liable for the truth or falsity of the certificate, wherever that knowledge might be found in the corporation.

The logic for the expansive notion of corporate liability is the proposition that to enforce laws such as the Sherman Act and Interstate Commerce Commission (ICC) and banking regulatons effectively, the court has to impose liability on the corporate entity.[27] The Supreme Court in *New York Central* said the acts of agents "can be controlled in the interest of public policy by imputing his acts to his employer." The Court spoke about the class of crime "whenever the crime consists in purposely doing the things prohibited by statute." Justice Day's view was that without this application, certain crimes would go unpunished and the government could not have effective enforcement since giving rebates "enured to the benefit of the corporation of which the individuals were but instruments."[28]

The Ninth Circuit in *Hilton Hotels* took a look at the intent of Congress and said:

"[I]t is reasonable to assume Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents. . . ."[29]

In the court's view, the likely consequence of the pressure to maximize profits that corporate owners commonly impose would be a violation of the Sherman Act. The courts are troubled by the concern that a corporation could evade responsibility by referring to its complex structure. The Second Circuit said, "to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits and open the door wide for evasion."[30]

Thus, it seems clear that the law is not sympathetic to the limits of a manager in controlling the company's exposure to the criminal laws. That the seminal cases occurred during a period when corporate prosecutions were rare (and presumably this judicial language exacted higher expectations the smaller the size of the corporation) is worth considering.

Scope of Criminal Fraud Statutes

Almost all fraud prosecutions of public contractors have as their main charge violation of one of three statutes: false statements,[31] false claims,[32] or conspiracy to defraud.[33]

The false statement statute prohibits essentially two types of conduct: false statements and concealments. The false statement can be oral or written and does not require an oath.[34] Thus, false oral statements to government auditors may be violations.[35] A few courts have not required the statements to be literally false but only "fairly read as false."[36] The statement does not have to be submitted to the United States, only "within the jurisdiction of the United States."[37] This concept covers false statements in the books and records of a corporation even if the records are never examined by the United States.[38] A subcontractor false statement to a prime contractor is also subject to prosecution.[39]

The essential element of knowledge goes to the false statement or concealment, not to the government's involvement,[40] and can be satisfied by direct or circumstantial proof of reckless disregard for the truth of the statement with a conscious effort to avoid learning the truth.[41] Finally, the false statement must be material; i.e., it must matter to the United States.[42] Yet the government does not have to rely on the statement or actually be influenced.[43] In fact, the government can know the truth or even have not read or ignored the statement.[44]

The concealment aspect of the statute is even more interesting. Concealment by trick, scheme, or device can be used to support the charge where the contractor's statement is literally true but also is part of an alleged scheme.[45] The government must show a "legal duty" to disclose, but not necessarily because of a statute or regulation,[46] and proof of some affirmative act of concealment.[47]

The criminal false claim statute, 18 U.S.C. 287, prohibits false claims for money to the United States. The statute mirrors the false statement provision, but with no requirement of materiality or that the "claim" be submitted directly to the United States.[48]

The scope of conspiracy to defraud has been set out in two Supreme Court opinions. The key concept in the statute is to "obstruct or impair legitimate government activity."[49] There is no requirement for any pecuniary or proprietary loss,[50] and the government does not have to prove a knowing violation of an agency's rules, regulations, or procedures.[51] Obstruction and impairment have taken many forms.[52] In *United States v. Hay*,[53] the obstruction was of an audit for claims submitted to the Vietnam government relating to a project funded in part by American loans. The United States did not pay for the audit and no additional monies were due from the United States based on the audit.

Breadth of Regulatory Exposure to Fraud Statutes

A short walk through the regulations of the procurement system reveals that public contractors face the proscription of these fraud statutes in conducting their everyday business.

The system is littered with certificate requirements exposing the contractor to corporate liability: cost and pricing data,[54] commercial pricing,[55] indirect costs,[56] small business status,[57] Cost Accounting Standards (CAS) coverage,[58] contingent fees,[59] claims,[60] contract conformance,[61] independent pricing,[62] Buy American Certificate,[63] allowability of indirect costs,[64] Davis Bacon Act,[65] Walsh Healey Act,[66] contract termination proposals and certificate of proper cost allocation,[67] affirmative action compliance,[68] clean air and water,[69] proprietary data,[70] and U.S. Flag Carriers.[71] All invitations for bids (IFB) contain a specific warning about liability for false statements.[72]

Other areas of potential liability include pre-award surveys,[73] inspection and testing,[74] fast pay,[75] treatment of indirect cost (reasonable, allowable, and allocable),[76] indirect cost rate proposals,[77] travel procedures,[78] progress payments,[79] disposal of inventory,[80] and employment of former DOD employees.[81] From becoming eligible to contract, seeking the contract, performing on the contract, securing payments under the terms of the contract, and termination of the contract, to dealing with the government seeking suspension from contracting,[82] the contractor is subject to application of the criminal fraud statutes at each stage.

Several contractors have been prosecuted for charges that include oral falsifications to contract personnel and DCAA auditors.[83] Wherever Congress imposes an added certification, it essentially is relying on the criminal false statement statute for its enforcement.[84]

Review of the Procurement Fraud Cases

Fraud in the procurement process is not new,[85] and the contractors—along with their officers and employees—have been prosecuted in cases that span the full range of the procurement process.[86]

Beginning with mischarging, a series of cases were prosecuted in Massachusetts between 1940 and 1948 that dealt with false time card schemes by welders and tally counters in Navy shipyards.[87] Inflated time card prosecutions are consistently reflected in reported cases.[88] Charging to another contract to cover expired contract effort or overruns appears as false statement and false claims convictions.[89] Not always is there dispute over the actual work, just the accuracy of the bookkeeping.[90]

Another frequent application of the fraud statutes to the procurement process is when a contractor supplies something other than what the contract requires.[91] In enforcement jargon, referred to as substitution cases, the contractor is accused of supplying a defective product or a product of lesser quality,[92] and it often involves either deceiving or corrupting the government's quality control efforts.[93]

Many different types of schemes result in a false claim to the United States. In addition to the mischarging context, it can be a direct claim,[94] subcontractor claim,[95] or a change order.[96] For practical purposes, there is no less exposure of a subcontractor to the application of the statutes.[97]

Prosecutions based on certificates have been the basis of various cases:[98] welding qualifications,[99] hourly wages,[100] surplus property disposition,[101] invoices,[102] independent pricing,[103] and disposition of government-furnished equipment.[104] The courts have not had trouble with certificates that, by their terms, introduce a subjective statement on the propriety of the claim: "costs were fully reimburseable,"[105] or the bill is "correct and just."[106] The certificate required to satisfy the Truth in Negotiations Act has also been subject to criminal prosecution.[107] The fraud statutes have been used to deal with progress payments schemes,[108] false resumes,[109] new versus used parts,[110] fast pay,[111] small business qualification,[112] and kickbacks.[113]

The Difficult Joinder of Federal Criminal Law Concepts and the Procurement Regulations and Practices

To make these theories of prosecution, regulatory structure, and description of prior prosecutions more understandable, it is useful to focus on three reported cases. Two represent prosecution failures, and the third represents a prosecution success.[114] The scope of the federal prosecution theories and the problems the government can incur in pursuing fraud in the complex jungle of procurement regulations and practices are evident in all three of the cases.

Southern Airways

Southern Airways' civil and criminal investigation and prosecution are recounted in a 90-page district court decision.[115] Southern and its executives were eventually acquitted of the criminal charge of fraud, and the civil false claims and breach of contract charges were dismissed. The contract in 1967–1969 with the U.S. Army to supply two million 155mm Howitzer shells had detailed quality control provisions.

For almost eight years, these provisions were the subject of intense scrutiny by prosecutors and investigators pursuing the allegation that Southern supplied 18,000 defective shells. The suspicions were based on the allegation often reflected in substitution cases—shells produced when inspectors were not present, uninspected night work, and altered records to conceal rework. The government struggled

over the terms of the contract, and disagreements on proper interpretation arose within the contracting agency. The issue was the distinction among minor versus major defects, critical versus noncritical defects, defective versus nonconforming shells, and 100 percent versus sample inspections.

Searching for an intent to defraud as required by even the civil false claims statute, the district court could not find it in the context of the detailed contracts and varying standards and interpretations within the government. The court stated it assumed that:

"[T]he action is the result of an inability (or refusal) of those acting for the plaintiff to recognize that a contract can be subject to more than one reasonable construction and that a party to a contract by pursuing a cause of action predicated upon his own reasonable construction of the contract does not thereby subject himself to liability for fraud."[116]

The court complained about the absence of "an unambiguous and monolithic interpretation of the contract," noting that the contract was written by the United States, not the defendant.[117] Interestingly, the government witnesses of the fraudulent activity largely came from a dissident employee group that had walked off the job site.

Race

In *United States v. Race*,[118] the Fourth Circuit reversed a conviction of three individuals who were convicted of conspiring to defraud and submitting false and fraudulent invoices for payment for services to the Navy. The contract with an engineering firm was changed from firm-fixed-price to indefinite quantity, time, and materials, with a cost ceiling of $1 million. The government alleged that the contractor submitted false billings in excess of the amount allowable under the contract and for work and material not authorized in advance.

The main area of attention was the billing of employee travel costs. Essentially, the contractor billed at the Joint Travel Regulations (JTR) rate and reimbursed its employees at a lesser rate. The government contended that the contractor was to be reimbursed only for costs based on its actual rate. Interestingly, in an audit made before contract award, the contractor made its practice clear to the DCAA.

The per diem clause in the contract stated "[p]er diem will be paid in accordance with the provisions of the Military Joint Travel Regulations. . . ." The government contended that this meant the contractor was to be "reimbursed" for its actual per diem expenditure, subject to a maximum limitation under the JTR. The court said:

"We are unable to follow the Government's complicated adaption of the per diem clause in the contract. Its construction of the clause is far more than a "strained" interpretation of the clause; it is a complete rewriting of the contractual clause in order to express what the Navy may have meant to say (though we doubt this) and not what is said. . . ."[119]

The court concluded that it was convinced the contract authorized the billing of per diem by rate versus actual. The court went on to say that when the government concedes that a clause is ambiguous, "it necessarily concedes that the defendant's construction . . . is reasonable."[120] The court concluded that whenever a defendant statement or action under a contract accords with a *reasonable* interpretation, the government cannot effectively negate any reasonable interpretation as is required by the statute.[121]

Mayfair

United States v. White,[122] is one of the most difficult cases and confronts the application of fraud statutes to the procurement system's dependence on estimates. The case arose from National Aeronautics and Space Administration (NASA) contracts and subcontracts to build a support structure for the space shuttle. Several corporations and their principals were convicted of submitting false statements and false claims. The defendants contended that these submissions to NASA for change order work were merely estimates presented to the government as an opening presentation in a negotiation and could not, as a matter of law, constitute false statements or false claims.

The contractor's claim was based on more than 500 change orders. In some cases, after the original change order proposal was submitted, NASA complained that it was inflated and the contractor reduced the claim.[123] The court concluded that the evidence was "overwhelming" that the hours submitted in the proposal

were inflated.[124] The defendants argued that the proposals were only estimates.

The court focused on the fact that the defendant did not present to the government its factors or formulas used in the estimates and that the contractor represented the estimates as based on "actual hours." Trying to determine whether the defendants submitted "truthful estimates," the court said:

"[A] contractor may not invoke the terms 'estimates' and 'negotiations' to justify a willful attempt to fleece the system. There is a line between estimates which reflect reasonably incurred expenses and estimates which are so grossly inflated when compared to actual costs that they are by their very nature fraudulent."[125]

In responding to the defendants' argument that they relied on formulas, the court pointed to oral assurances made at the negotiating sessions with the government that the change orders were based on actual costs. The court was equally unimpressed with the argument that NASA's willingness to negotiate or the government's failure to prosecute estimate cases was a good defense.[126]

DOD Guidelines

Criminal liability of public contractors cannot be discussed without making reference to the DOD Voluntary Disclosure Program and recent DOD regulations on contractor ethics and compliance programs. The concept that the corporate wrongdoer is under some overriding duty upon discovery to disclose his wrongdoing has crept into the enforcement fabric in the past several years. Statutorily, the amendments to the Anti-Kickback Act and the Civil False Claims Act reduce the penalty for the violator who discloses the conduct to the government.[127] Under the Anti-Kickback Act, contractors are to have procedures to prevent and detect kickbacks and are to report possible violations to the inspector general.[128]

Beginning with the prescription in the Packard Commission that "contractors have a legal and moral obligation" to disclose to government authorities misconduct discovered as a result of self-review, 42 contractors have agreed to adopt "procedures for voluntary disclosure of violations of federal procurement laws and corrective actions taken." Deputy Defense Secretary Taft announced the DOD's Voluntary Disclosure Program on July 24, 1987. Although not exempting volunteers from debarment, the DOD's direction and intention are clear.

On September 11, 1987, the DOD went even further. In prescribing a series of recommended management controls, it indicated that compliance with the suggestions may relieve the corporate contractor from the penalties of suspension and debarment.[129] The theory is that good citizen contractors fulfilling our need for a strong national defense should not be subject to the threat of debarment if they do everything reasonably expected to avoid fraud. In issuing the DFARS 203.70, the DOD may have taken a major step to decouple the criminal investigation/prosecution and the suspension/debarment processes.

The DOJ intentions are less clear. Past practices, although outside the context of the DOD Voluntary Disclosure Program, indicate that the DOJ is inclined to prosecute volunteers.[130]

DOJ Guidelines

The DOJ has no guidelines for its more than 2,000 prosecutors tailored to exercising prosecutive discretion in cases involving alleged corporate violators. With 94 U.S. attorneys with a high degree of independence and various criminal prosecutive agencies within DOJ headquarters, inconsistent exercise of prosecutive discretion potentially can be the rule rather than the exception. It is impossible to measure or closely examine the exercise of that discretion since the decision *not* to prosecute is rarely subject to public view. Two sources of DOJ Guidelines provide some indirect guidance on how prosecutors make their decisions.

Principles of Federal Prosecution

In July 1980 Attorney General Benjamin R. Civiletti published the *Principles of Federal Prosecution* (the *Principles*) which serves as the first and only formal statement of the DOJ's prosecutorial policies. In the preface, the *Principles* acknowledges that "a determination to prosecute represents a policy judgment." Notably, the *Principles*, except in one place, acknowledges no special policy issues inherent in prosecution of a corporation. Tailored to the decision to prosecute an individual, the *Principles* addresses the

decision to prosecute or decline, selection of charges, plea agreement process, and non-prosecution/cooperation agreements.

On the decision to prosecute, the *Principles* requires that the prosecutor have "probable cause to believe that *a person*" has committed a federal offense and the admissible evidence "will probably be sufficient to obtain and sustain a conviction." The *Principles* suggests that the prosecutor decline if prosecution would serve "no substantial federal interest" and if "no adequate noncriminal alternative exists." In evaluating the federal interest involved, the *Principles* focuses on law enforcement practices, seriousness of the offense (public attitudes, position of trust), deterrent effect, "person's" culpability, "person's" willingness to cooperate, and probable sentence.

The *Principles* gives noncriminal alternatives some attention and acknowledges that the criminal process is not the only appropriate response to antisocial conduct. In fact, the "comment" in the *Principles* suggests that noncriminal alternatives can be expected to provide an "effective substitute" for criminal prosecution, particularly in the regulatory area.

The *Principles* also outlines the relevant considerations to entering into a plea agreement or a nonprosecutive cooperation agreement. Factors include willingness to cooperate, absence of criminal history, remorse or contrition, probable sentence, value of cooperation, relative culpability, and importance of the case. In the only mention of a corporation's treatment, a comment notes with approval the assistance that a corporation can tender in a plea to satisfy its own liability and that of one of its officers.[131]

Many of these prosecution principles applied to the decision to prosecute a corporation suggest that it is better for the government to pursue the offending person and not the corporation. For example, the noncriminal remedies for corporations, particularly defense contractors, are severe; their cooperation, if not the target of the investigation, can be reasonably expected by the prosecutor. That policy is not reflected in the DOJ's prosecution practices.

Voluntary Disclosure Program

The DOJ, in the context of its response to the DOD's Voluntary Disclosure Program, has indicated some of the factors important in the decision on whether to prosecute a volunteer corporation. On July 17, 1987, Assistant Attorney General Weld issued to U.S. attorneys "guidelines in referral, investigation, and prosecution of Department of Defense cases involving contractors who have voluntarily disclosed procurement-related problems."[132]

The criteria in determining whether to prosecute a volunteer corporation where the law and evidence are otherwise sufficient are (1) the quality of the disclosure and the contractor compliance program, (2) the extent of the fraud in terms of financial loss and its pervasiveness in the corporation, (3) the level of corporate officers and employees involved, (4) cooperation of the corporation in terms of assistance in the government's investigation, and (5) the extent of any disciplinary action taken by the conractor against employees. Interestingly, as an addendum to the Guidelines, the DOJ restates the "Legal Liability of Corporations." The Guidelines repeatedly stresses that the decision will be made on a "case-by-case" basis by U.S. attorneys and the DOJ's Procurement Fraud Unit.

Conclusion

The scope of the criminal laws and their application to the corporate contractor are fearsome. The contracting process is complex, and successful prosecution is often problematic. The DOD has set the guidelines on how a *good citizen* public contractor and its employees can avoid the devastating impact of debarment and suspension. Perhaps the DOJ should make the same statement.

Good citizen public contractors that do everything reasonably necessary to satisfy the government's interest in integrity in its contract process should not be subject to investigation and prosecution for the inevitable false statements that are occasioned by the complexity of the process or errors of individuals.

As long as the DOJ thinks it is necessary for deterrent purposes to be vague on its response to the Voluntary Disclosure Program and other DOD initiatives designed to give credit to the good citizen contractor, those efforts will be much less effective. In the meantime, public contractors should seriously consider the opportunity in DFARS 203.70 to decouple the criminal and administrative processes and put themselves on a more equal footing in responding to a criminal investigation.

Endnotes

1. False Claims Amendments Act of 1986, Pub. L. 99-562, 31 U.S.C. 3729, broadly defines the requisite knowledge to include deliberate or reckless disregard for the truth, adds a potential 10-year statute of limitations, authorizes civil investigative demand authority, and expands *qui tam* authority, and trebles damages. With the exception of the *qui tam* provisions, these were all legislative initiatives of the Civil Division of Justice since the Carter administration.
2. 5 U.S.C. App. 3 § 6(a)(4).
3. 10 U.S.C. 2313(d)(1).
4. 10 U.S.C. 2324; DOD FAR Supplement (DFARS), 42.770; DFARS 52.242-7003.
5. In 1981 the DOD suspended and debarred 150 contractors. Last year the DOD suspended or debarred more than 800 contractors.
6. See discussion on DOD Guidelines.
7. Senator Charles E. Grassley (R-IA) in opening the hearings on Civil False Claims Act amendments stated that "Contractor fraud may well be the world's second oldest profession. Certainly after 122 years of experience with contract fraud in this country, the U.S. Government should have come to grips with how to solve this age-old problem." Hearings on S.1652, a bill to amend the False Claims Act before the Subcommittee on Administrative Purchase and Procedure of the Committee on the Judiciary United States Senate, 99th Cong. 1st sess., September 17, 1985, at 2. The senator's principal contribution subsequently was liberalizing the *qui tam* provisions of the statute.
8. Suspension and debarment are most often based on an indictment or conviction. As a matter of practice all civil remedies normally are deferred in favor of criminal investigation and prosecution. Even the *qui tam* amendments encourage the court to defer the action in favor of a criminal investigation. *See also* the Program Fraud Civil Remedies Act of 1986, 31 U.S.C., 3801 ff.
9. *A Quest for Excellence*, Final Report to the President by the President's Blue Ribbon Commission on Defense Management (June 1986).
10. 1 U.S.C. 1 defines a person as corporations, companies, associations, firms, partnerships, securities, and joint stock companies as well as individuals. *United States v. A&P Trading*, 358 U.S. 121 (1958); *United States v. Union Supply Co.*, 215 U.S. 50 (1909), stand for the proposition of partnership liability.
11. *New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909). The jury instructions approved by the Second Circuit in *Koppers v. United States*, 652 F.2d 290, 298 (2d Cir. 1981) stated that a corporation will be liable for the acts of its managerial agents "done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employees have the authority to perform."
12. *United States v. Armour*, 168 F.2d 342 (3d Cir. 1948) (salesman and price controls); *United States v. George Fish, Inc.*, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).
13. *United States v. Harry L. Young & Sons*, 464 F.2d 1295 (10th Cir. 1972); *Texas-Oklahoma Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1970); *Steere Tank Lines Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963).
14. *United States v. Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975).
15. *T.I.M.E.-D.C. v. United States*, 382 F. Supp. 730 (W.D. Va. 1974).
16. *Ross & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958); *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939).
17. *Koppers v. United States*, *supra* at 298; *Hydrolevel v. United States*, 635 F.2d 118, 127 (2d Cir. 1980); *United States v. Hilton Hotels*, 467 F.2d 1000 (9th Cir. 1972).
18. *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946) (company published numerous bulletins on compliance with the limits of the War Production Board); *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979); *United States v. Cadillac Oversupply*, 568 F.2d 1078 (acts done in direct contravention of instruction of president); *Hilton Hotels*, *supra* at 1004 (no legal persuasion); *Steere Tank Lines v. United States*, 330 F.2d 719 (5th Cir. 1963).
19. *United States v. Basic*, 711 F.2d 570 (4th Cir. 1983). Where there was long-standing corporate policy against bid rigging that was strictly enforced, court instructed jury to evaluate in context of whether criminal acts were done to benefit the corporation.
20. *United States v. Beusch*, 596 F.2d at 878. Court also said merely stating and publishing instruction and policy without diligently enforcing them is not enough to place the acts of the employees who violate them outside the scope of employment.
21. *United States v. Hilton Hotels*, 467 F.2d at 1006.
22. *United States v. Carter*, 311 F.2d 934, 942 (6th Cir. 1963) (no need to prove actual benefit to the corporation). In *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962), the court found the acts of the employees were to benefit themselves and not the corporation.
23. *United States v. General Motors Corporation*, 121 F.2d 376, 410 (7th Cir. 1941).
24. *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2d Cir. 1962). However, in what appears to be the only defense contractor case to deal with corporate liability, *Imperial Meat v. United States*, 316 F.2d 435, 440 (10th Cir. 1963), the court instructed that the jury had to find the individual guilty to find the corporation guilty.

25. *Steere Truck Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963); *Inland Freight v. United States*, 191 F.2d 313, 315 (10th Cir. 1951); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974); *United States v. Sawyer Transport Inc.*, 337 F. Supp. 29, 30-31 (D. Minn. 1971) *aff'd* 463 F.2d 175 (8th Cir. 1972).

26. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

27. One commentator traces corporate criminal enforcement origins to nuisance prosecutions that have as their purpose to abate the practice. Brickley, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Washington U.L.Q. 393 (1982).

28. *New York Central*, 212 U.S. at 495.

29. *United States v. Hilton Hotels*, 467 F.2d at 1005.

30. *United States v. Fish, supra; United States v. Armour*, 168 F.2d 342, 344 (3d Cir. 1948). That same interest is expressed to justify incorporation of collective knowledge in *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 738.

31. 18 U.S.C. 1001.

32. 18 U.S.C. 287.

33. 18 U.S.C. 371.

34. *United States v. Beacon Brass*, 344 U.S. 43, 46 (1925); *United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977). The false statement can be oral but one court set aside a prosecution on this theory in the absence of a verbatim transcript. *United States v. Jardins*, 772 F.2d 578 (9th Cir. 1985); *United States v. Clifford*, 426 F. Supp. 696 (S.D.N.Y. 1976).

35. *United States v. Fern*, 696 F.2d 1269 (11th Cir. 1983) (false statement to IRS auditor).

36. *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980), *cert. denied sub nom. Anthony J. Bertucci Construction Co. Inc. v. United States*, 450 U.S. 917 (1981); *United States v. Huber*, 603 F.2d 387, 398 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Anderson*, 579 F.2d 455, 470 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978), imposed the burden on the government to negate "any reasonable interpretation that would make the defendant's statement factually correct." *United States v. Mandanici*, 729 F.2d 914, 920 (2d Cir. 1984) reversed conviction based on a misleading but literally true statement.

37. *Ebeling v. United States*, 248 F.2d 429 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957). In a price redetermination case, contractor falsified his own records. Court focused on fact the records were "legally required."

38. *United States v. Uni Oil Inc.*, 646 F.2d 946 (5th Cir. 1981); *United States v. Hooper*, 596 F.2d 219, 233 (7th Cir. 1979); *United States v. Kraude*, 467 F.2d 37 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972). The Eleventh Circuit did not require proof of a regulation requiring retention of the false records. *United States v. Diaz*, 690 F.2d 1352, 1358 (11th Cir. 1982).

39. 18 U.S.C. § 2.

40. *Yermian v. United States*, 468 U.S. 63 (1984).

41. *United States v. White*, 765 F.2d 1469 (11th Cir. 1985); *United States v. Schaffer*, 600 F.2d 1120 (5th Cir. 1979); *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied sub nom., Thaler v. United States*, 821 (1973); *United States v. Beck*, 615 F.2d 441 (7th Cir. 1980).

42. *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956). "The false statement has a natural tendency to influence or was capable of influencing the decision of the agency."

43. *Nilson Van Storage v. Marsh*, 755 F.2d 362, 367 (4th Cir. 1985); *United States v. Liechtenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied sub nom., Bella v. United States*, 447 U.S. 107 (1980); *United States v. Markham*, 537 F.2d 187 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

44. *United States v. Diaz*, 690 F.2d 1358; *United States v. McIntosh*, 655 F.2d 80, 83 (5th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

45. *United States v. London*, 550 F.2d 206 (5th Cir. 1977).

46. *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Muntain*, 610 F.2d 964, 971-72 (D.C. Cir. 1979); *See also United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

47. *United States v. London, supra.*

48. *E.g.*, Subcontractor claims *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

49. The operative language in 18 U.S.C. 371 is "defraud the United States." Although this language is broad, recent cases rely heavily on the definition of "defraud" provided by the Supreme Court in two early cases: *Haas v. Henkel*, 216 U.S. 462 (1910); *Hammerschmidt v. United States*, 265 U.S. 182 (1924). *See also United States v. Keitel*, 211 U.S. 370, 393-95 (1908). While *Hammerschmidt* attempted to limit the effect of *Haas*, circuit courts have relied on both attempts at defining "defraud the United States" to justify federal prosecution. *See, e.g., United States v. Thompson*, 366 F.2d 167 (6th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966).

In *Haas* the court stated: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government. . .[A]ny conspiracy which is calculated to obstruct or impair. . .[agriculture department] efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation." 216 U.S. at 479-80.

In *Hammerschmidt*, Chief Justice Taft, writing for the Court, defined "defraud" as follows: "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also

means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicanery or the overreaching of those charged with carrying out the government intention." 265 U.S. at 188.

50. *United States v. Johnson*, 383 U.S. 169 (1966); *Hyde v. Shine*, 199 U.S. 62 (1905); *United States v. Jacobs, supra*; *United States v. Peltz*; 433 F.2d 48 (2d Cir.), *cert. denied* 401 U.S. 955 (1971); *United States v. Thompson, supra*.

51. *United States v. Conover*, 772 F.2d 715, 716 (11th Cir. 1985).

52. This type of fraud may take any one of several forms: bribery of a government official to breach a duty owed to the government, *United States v. Glasser*, 116 F.2d 690 (7th Cir. 1940), *modified*, 315 U.S. 60 (1942); misuse of a right or privilege given by the government, thereby obstructing and impairing a governmental function, *e.g.*, granting a permit, *Wallenstein v. United States*, 25 F.2d 708 (3d Cir.) *cert. denied*, 278 U.S. 608 (1928); administering VA loans, *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 906, 958 (1969); building hospitals, collecting tax, *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958); obstruction by diverting federal funds "from their true and lawful object." *Harney v. United States*, 306 F.2d 523, 527 (1st Cir.), *cert. denied sub nom., O'Connell v. United States*, 371 U.S. 911 (1962). *United States v. Thompson, supra*, involved a kickback between a general contractor and a subcontractor.

53. 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935.

54. FAR 15.804-4, exemption from certificate requirements, 48 CFR 53.215-26.

55. FAR 15.813 (Commercial Pricing Certificate), 52.215-32 (Contract Clause), 10 U.S.C. 2323, 41 U.S.C. 253e.

56. DFARS 52.242-7003.

57. FAR 19.301.

58. FAR 52.230-1.

59. FAR 3.400, 52.203-4 (Contract Clause), 53.301-119.

60. FAR 33.207 requires senior company official to certify: (1) The claim is made in good faith; (2) Supporting data is accurate and complete to best of contractors knowledge and belief; and, (3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable. *See also* DFARS 52.233-7000.

61. FAR 52.246-15.

62. FAR 52.203-2.

63. FAR 52.225-1.

64. 10 U.S.C. 2324(h)(1), DFARS 31.7001.

65. 40 U.S.C. 276a.

66. 41 U.S.C. 35.

67. FAR 53.249(a)(4), SF 1437 through 1440.

68. FAR 52.222-25.

69. FAR 52.223-1.

70. DFARS 52.227-7013 and 52.227-7036.

71. FAR 52.247-63.

72. FAR 52.214-4.

73. FAR 9.100 ff.

74. FAR 9.301 ff.

75. FAR 13.301-305.

76. FAR 31-201.

77. FAR 42.705-1.

78. FAR 31.205-46.

79. FAR 32.500 ff.

80. FAR 46.615, 53.245(d), SF 1424.

81. Annual report required by 10 U.S.C. 2397c, DFARS 52.203-7002.

82. *United States v. Horowitz*, 806 F.2d 1222 (4th Cir. 1986).

83. *E.g., United States v. Litton*, Amended No. 86-00311-1, (E.D. Pa.). See also cases described in Graham, *Mischarging a Contract Dispute or a Criminal Fraud*, 15 Pub. Cont. L.J. 208 (1985).

84. For example, the congressional sponsors of the Truth in Negotiations Act emphasized on the floor of the House the certificate requirement encompassed the false statement statute. *Cong. Rec.*, House, June 7, 1962, pp. 9238-9240. Congress in enacting limitations to overhead claims for contractors in 1985 gratuitously included a subsection that states that a contractor that submits an overhead proposal that includes unallowable costs with knowledge of its unallowability is subject to the civil and criminal false claims statutes. 10 U.S.C. 2324(i).

85. *United States v. Christopherson*, 261 F. 225 (E.D. Mo.) (cans of pepper and coffee); *United States v. Franklin*, 174 F. 161 (Circuit Court S.D.N.Y. 1909) (false claim related to "cartage" and dispute over actual versus "should have" costs. All were substitution type cases.

86. *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1957); *Nye & Nissen v. United States* 168 F.2d 846 (9th Cir. 1948), *aff'd*, 336 U.S. 613; *United States v. Cartridge Co.*, 95 F. Supp. 384 (E.D. Mo. 1950).

87. *McGunigal v. United States*, 151 F.2d 162 (1st Cir. 1945); *United States v. Brogan*, 63 F. Supp. 702 (D. Kan. 1945); *United States v. Gonzales*, 56 F. Supp. 995 (D. Mass. 1944).

88. *United States v. Brown*, 742 F.2d 363 (7th Cir. 1984); *United States v. North American Report Inc.*, 740 F.2d 50 (D.C. Cir. 1984), *cert. denied*, 107 S. Ct. 273 (1985); *United States v. Jackson*, 714 F.2d 809 (8th Cir. 1983); *United States v. Richmond*, 700 F.2d 1183 (8th Cir. 1983); *United States v. Baker*, 626 F.2d 512 (5th Cir. 1980); *United States v. Smyth*, 556 F.2d 1179 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977) (cost plus contract, forged labor distribution sheets); *United States v. Maher*, 582 F.2d 842 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (charged time calculated on percent of completion on a time and materials contract); *United States v. Michener*, 152 F.2d 880 (3d Cir. 1945).

89. *United States v. Martel*, 792 F.2d 630 (7th Cir. 1986) (contract expired, employees charged time to cover work done between contracts); *United States v. Systems Architect*, 757 F.2d 373 (1st Cir. 1985).

90. *United States v. Martel*, *supra*.

91. *United States v. Marks Corp.*, 240 F.2d 838 (3d Cir. 1957); *United States v. Steiner Plastics Mfg. Co., Inc.*, 231 F.2d 149 (2d Cir. 1956) (rejected canopies, stolen approval stamps) (leading concealment case); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946); *United States v. United States Cartridge*, 95 F. Supp. 384 (E.D. Mo. 1950); *United States v. Bass*, 472 F.2d 207 (8th Cir. 1972).

92. *United States v. John Berhard Industries*, 589 F.2d 1353 (8th Cir. 1979) (COCESS substitute parts); *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978); *Imperial Meat v. United States*, 316 F.2d 435 (10th Cir. 1963) (choice versus boneless beef); *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1957) (lesser quality chloroform); *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949); *Nye & Nissen v. United States*, 168 F.2d 846 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949); *Roberts v. United States*, 137 F.2d 412 (4th Cir. 1943) (fresh versus frozen mackerel).

93. *United States v. Romano*, *supra* (corruption of inspectors); *Steiner Plastics*, *supra* (phony stamps, switched samples).

94. *United States v. Litton Systems Inc.*, 722 F.2d 264 (5th Cir. 1984); *Spivey v. United States*, 109 F.2d 181 (5th Cir. 1940).

95. *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981).

96. *United States v. White*, 765 F.2d 1469 (11th Cir. 1985).

97. *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981) (reserves); *United States v. Bass*, 472 F.2d 207 (8th Cir. 1972) (subcontractor to general payments); *United States v. Ward*, 169 F.2d 460 (3d Cir. 1948) (padded payroll of subcontractor); *United States v. Greenbaum & Sons*, 123 F.2d 770 (2d Cir. 1941) (padded payroll).

98. A blank on a form can constitute a false certification, *United States v. Irwin*, 654 F.2d 671, 676 (10th Cir. 1981).

99. *United States v. Balk*, 706 F.2d 1056 (9th Cir. 1983).

100. *United States v. Greenbaum & Sons, Inc.*, 123 F.2d 770 (2d Cir. 1941).

101. *Todorow v. United States*, 173 F.2d 439 (9th Cir. 1949); *United States v. Epstein*, 119 F. Supp. 946 (E.D. Pa. 1953).

102. *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1957).

103. *United States v. Glazer*, 532 F.2d 224 (2d Cir. 1976); *United States v. Rogers*, 624 F.2d 1303 (5th Cir. 1980); *Nillson Storage v. Marsh*, 755 F.2d 362 (4th Cir. 1985).

104. *United States v. Fabric Garment Co.*, 262 F.2d 631 (2d. Cir. 1958).

105. *United States v. Huber*, 603 F.2d 387 (3d Cir. 1979).

106. *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1945).

107. *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986).

108. *United States v. Elkin*, 731 F.2d 1005 (11th Cir.), *cert. denied*, 469 U.S. 822 (1984).

109. *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981).

110. *United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).

111. *United States v. Wertheimer*, 434 F.2d 1004 (2d Cir. 1970).

112. *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1981), *cert. denied*, 107 S. Ct. 1578 (1982).

113. *Corey v. United States*, 346 F.2d 65 (1st Cir. 1965).

114. A more recent case that someone else could focus on is *United States v. General Dynamics*, 644 F. Supp. 1497 (C.D. Cal., 1986, rev'd, _____ F.2d _____ (9th Cir. 1987) in which the government after prevailing in the Ninth Circuit in an appeal of a district court order to refer the interpretation of the contract to the ASBCA, dismissed the indictment. Unlike judicial review of convictions, however, the exercise of prosecutorial discretion not to proceed rarely reveals all the factors in such decision to the public. However, in that case, Assistant Attorney General Weld testified before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, House of Representatives, July 30, 1987.

115. *United States v. Hangar One, Inc.*, 406 F. Supp. 60 (N.D. Ala., 1975).

116. *Id.* at 63.

117. *Id.* at 68. For nonprocurement cases that struggle with ambiguous regulations, see *United States v. Larm*, 780 F.2d 780, 785 (9th Cir. 1987) (Medicare); *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983).

118. *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

119. *Id.* at 118.

120. *Id.* at 1120.

121. *Id.* at 1120.
122. *United States v. White*, 765 F.2d 1469 (11th Cir. 1985).
123. *Id.* at 1476.
124. *Id.* at 1478.
125. *Id.* at 1481.
126. *Id.* at 1482.
127. 31 U.S.C. 3729 ff. False Claims Act Amendments.
128. 41 U.S.C. 54; FAR 52.203-7.
129. DOD Federal Acquisition Regulation Supplement, 203.7000 ff. recommends:
(a) A written code of business ethics and conduct and an ethics training program for all employees;
(b) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of government contracting.
(c) A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;
(d) Internal and/or external audits as appropriate;
(e) Disciplinary action for improper conduct;
(f) Timely reporting to appropriate government officials of any suspected or possible violation of law in connection with government contracts or any other irregularities in connection with such contracts; and,
(g) Full cooperation with any government agencies responsible for either investigation or corrective actions.
A contractor that implements an ethics and compliance program which tracks the DFARS and submits that program for advice and concurrence of the principal customers of an ethics program (inspector general, debarring official, defense procurement fraud unit, and agency general counsel), those same customers will be hard pressed to question the present responsibility of the contractor absent the unusual circumstance of senior level involvement. Without the threat of suspension based on a mere indictment, the contractor may be in a position to more effectively respond to an investigation and have the time to take any special corrective steps necessary to preserve the present responsibility status even in the face of a conviction.
130. As a consequence of a voluntary disclosure program instituted by the SEC to deal with alleged overseas bribery by U.S. corporations, the DOJ prosecuted the Williams Company; Control Data Corporation; U.S. Lines; Sea Land Services; Seatram Lines, Inc.; United Brands, Inc.; Westinghouse Corp.; Gulfstream American Corp.; Lockheed Corp.; Page Airways Corp.; Textron, Inc.; and, McDonnell Douglas Corp. As part of voluntary disclosure program to deal with illegal corporate campaign contributions, the Watergate Special Prosecutor prosecuted American Airlines; Goodyear Tire and Rubber Company; Minnesota Mining and Manufacturing Company; Braniff Airways, Inc.; Ashland Petroleum; Gabon Corp.; Gulf Oil Corp.; Phillips Petroleum Corp.; Carnation Company; Diamond International Company; National By-Products, Inc.; Greyhound Corp.; Northrop Corp.; Lehigh Valley Cooperative Farmers; LBC&W, Inc.; Time Oil Corp.; Ashland Oil; and, American Shipbuilding Company, among others.
131. *Principles of Federal Prosecution*, DOJ (July 1980), p. 22.
132. *United States Attorneys Manual.*